American Bar Association Journal

This Month's Cover

This month marks the 147th anniversary of the birth of Abraham Lincoln, the great Civil War President. Lawyers are not likely to forget that Lincoln belonged to their profession and exemplified its finest traditions throughout his life. The line drawing is by Charles W. Moser of Chicago.

February, 1956

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $5.00;
to Members of the American Law Student Association, $1.50.
Vol. 42. No. 2. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

E. Smythe Gambrell

■ To meet the deadline for the February issue, I am writing this on New Year's Day, a time for looking forward—and backward. Traditionally, this is a day of self-evaluation—a day of planning for the future. What has been our performance as an organization and where are we going?

In 1878, under the leadership of Simeon E. Baldwin, of Connecticut, a group of seventy-five select lawyers from all parts of our country assembled at Saratoga Springs and gave us our semi-social beginning. For almost forty years thereafter the American Bar Association fostered good fellowship in an atmosphere of social grace and topflight oratory. Then, in 1916, under the inspiration of its President, Elihu Root, the Association began to realize that the profession must be built upward and not downward; that the national body must be truly representative of, and responsive to, the profession generally; that its leadership could never be authentic or effective upon a narrow or selective basis; that it must be all-inclusive in order to command the interest and respect of the profession and the public; that it could never do great work until it established a healthy organic connection between itself and the state and local bar associations. President Root called a conference of state and local bar association delegates in connection with the Association's 1916 Annual Meeting in Chicago. Our founder, Judge Baldwin, still active, became the first Chairman of the Conference of Bar Association Delegates. This was the beginning of the "representative era" of the Association and of the movement to give it the form and character and authority essential to its functioning for the profession as a whole. In the twenty years of its existence (1916-1936), the Conference of Bar Association Delegates, under the leadership of Judge Baldwin, Mr. Root, Charles E. Hughes, Robert H. Jackson and others, did much to enlist the interest of state and local associations and the rank and file of the profession in the development of a national bar program. At the climax of that significant twenty-year period, during which the membership was doubled from approximately 15,000 to 30,000, it was my privilege, as the last Chairman of the Conference of Bar Association Delegates, in 1936, to serve as a member of the Association's Reorganization Committee, which drafted the new Constitution and By-laws establishing the authoritative House of Delegates. From the small select group which met at Saratoga Springs fifty-eight years before, the Association had developed into a democratic body headed toward its "era of service"—service to the average lawyer in his continuing legal education and his day-to-day work for his clients, and service to the public in providing civic leadership which the public has a right to expect from those to whom it has granted a valuable and exclusive franchise.

During the succeeding twenty-year period, from 1936 to 1956, our membership again was doubled, from 30,000 to almost 60,000. But, despite the progress the Association has made from period to period, and despite the fact that ours is the largest organization of lawyers in the entire world, it was borne in on me, upon taking office last August, that we were woefully inadequate in national organization. It was not easy to live with the fact that 76 per cent of the lawyers of this country are not members of the American Bar Association—have never felt its impact or enjoyed its many advantages —and that 75 per cent of the people in this country who need legal services never go to a lawyer. It seemed to me something ought to be done about it. Beneficiaries of a privilege which we have enjoyed for almost ten centuries, most of us have been taking our status too much for granted. We have been living in a fool's paradise. People in the business world are accustomed to the necessity of meeting keen competition at every turn, where the only answer is better service and better products; but we have relied too much upon statutes granting us the exclusive right to practice law. Why were such statutes enacted? Presumably because the public believed that the practice of law was an important activity which called for special license on considerations of superior character, education and training, and that it would be contrary to the public interest to allow unlicensed persons to enter that field. The least we can do, it seems to me, in the public interest and our own interest, is to exert ourselves to the utmost to maintain the profession at the highest level in character and competency

(Continued on page 158)

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $3.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $3.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

American Bar Association

HEADQUARTERS OFFICE, 1155 EAST 60th STREET, CHICAGO 37, ILLINOIS
WASHINGTON OFFICE, 1025 CONNECTICUT AVENUE, N. W., WASHINGTON 6, D.C.

Officers and Board of Governors 1955-56

President E. SMYTHE GAMBRELL, C. & S. National Bank Building, Atlanta 3, Georgia
Chairman, House of Delegates, JOHN D. RANDALL, American Building, Cedar Rapids, Iowa
Secretary JOSEPH D. STECHER, Toledo Trust Building, Toledo 4, Ohio
Treasurer HAROLD H. BREDELL, Consolidated Building, Indianapolis 4, Indiana
Assistant Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania

Ex Officio
- The President,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- LOYD WRIGHT, Last Retiring President, 111 West Seventh Street, Los Angeles 14, California
- TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal,* 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	ELWOOD H. HETTRICK, 11 Ashburton Place, Boston 8, Massachusetts	*Sixth Circuit*	BLAKEY HELM, M. E. Taylor Building, Louisville 2, Kentucky
Second Circuit	OSMER C. FITTS, 16 High Street, Brattleboro, Vermont	*Seventh Circuit*	RICHARD P. TINKHAM, Calumet Building, Hammond, Indiana
Third Circuit	VINCENT P. MCDEVITT, 1000 Chestnut Street, Philadelphia 5, Pennsylvania	*Eighth Circuit*	HERBERT G. NILLES, Black Building, Fargo, North Dakota
*Fourth Circuit**	ROBERT T. BARTON, JR., Mutual Building, Richmond 19, Virginia	*Ninth Circuit*	JOHN SHAW FIELD, 15 West Second Street, Box 1291, Reno, Nevada
Fifth Circuit	JOHN C. SATTERFIELD, Box 1172, Jackson, Mississippi	*Tenth Circuit*	THOMAS M. BURGESS, Mining Exchange Building, Colorado Springs, Colorado

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 148

Advisory Board of the Journal

REX G. BAKER	Houston, Texas
CUTHBERT S. BALDWIN	New Orleans, Louisiana
PHILIP R. BANGS	Grand Forks, North Dakota
WALTER M. BASTIAN	Washington, D. C.
E. DIXIE BEGGS	Pensacola, Florida
STEPHEN W. BOWEN	Tucumcari, New Mexico
GEORGE E. BRAND	Detroit, Michigan
JAMES E. BRENNER	Palo Alto, California
ROY A. BRONSON	San Francisco, California
THOMAS M. BURGESS	Colorado Springs, Colorado
CLAUDE E. CHALFANT	Hutchinson, Kansas
WALTER CHANDLER	Memphis, Tennessee
HOWARD COCKRILL	Little Rock, Arkansas
CYRIL COLEMAN	Hartford, Connecticut
WALTER E. CRAIG	Phoenix, Arizona
LELAND M. CUMMINGS	Salt Lake City, Utah
JOSEPH J. DANIELS	Indianapolis, Indiana
MARTIN J. DINKELSPIEL	San Francisco, California
JAMES M. DOUGLAS	St. Louis, Missouri
FRANCES CRAIGHEAD DWYER	Atlanta, Georgia
JAMES D. FELLERS	Oklahoma City, Oklahoma
DONALD A. FINKBEINER	Toledo, Ohio
OSMER C. FITTS	Brattleboro, Vermont
WILLIAM W. EVANS	Paterson, New Jersey
JOHN SHAW FIELD	Reno, Nevada
P. WARREN GREEN	Wilmington, Delaware
JOSEPH W. HENDERSON	Philadelphia, Pennsylvania
ALLAN H. W. HIGGINS	Boston, Massachusetts
FRANK L. HINCKLEY	Providence, Rhode Island
MANLEY O. HUDSON	Cambridge, Massachusetts
WILLIAM J. JAMESON	Billings, Montana
NICHOLAS JAUREGUY	Portland, Oregon
HUBERT S. LIPSCOMB	Jackson, Mississippi
L. DUNCAN LLOYD	Chicago, Illinois
SHACKELFORD MILLER, JR.	Louisville, Kentucky
MORRIS B. MITCHELL	Minneapolis, Minnesota
B. ALLSTON MOORE	Charleston, South Carolina
R. DEAN MOORHEAD	Austin, Texas
EDWARD E. MURANE	Casper, Wyoming
FRANK B. OBER	Baltimore, Maryland
EDWIN M. OTTERBOURG	New York, New York
FRANKLIN E. PARKER, JR.	New York, New York
JOHN J. PARKER	Charlotte, North Carolina
HAROLD L. REEVE	Chicago, Illinois
WARREN H. RESH	Madison, Wisconsin
FREDERICK D. G. RIBBLE	Charlottesville, Virginia
WILLIAM F. RILEY	Des Moines, Iowa
CLEMENT F. ROBINSON	Brunswick, Maine
WILLIAM ALFRED ROSE	Birmingham, Alabama
WHITNEY NORTH SEYMOUR	New York, New York
E. B. SMITH	Boise, Idaho
REGINALD HEBER SMITH	Boston, Massachusetts
ROBERT G. STOREY	Dallas, Texas
THOMAS TODD	Seattle, Washington
ROBERT W. UPTON	Concord, New Hampshire
JOHN J. WILSON	Lincoln, Nebraska
CHARLES C. WISE, JR.	Charleston, West Virginia
MELVIN T. WOODS	Sioux Falls, South Dakota
LOYD WRIGHT	Los Angeles, California

In the January issue of The American Bar Association Journal, there appeared a timely and important public interest advertisement entitled **"Modern Factoring And How It Meets Today's New Financial Requirements."** This is one of the most comprehensive analyses ever published on the subject, and it is creating widespread interest.

At the time of publication, reprints of this 5-page article were offered without charge to members of the legal profession. The response has been gratifying.

If you did not see this public interest advertisement, we would be pleased to send you a reprint with our compliments. If you would like additional copies for your files, please indicate the quantity. Address your request to Mr. Walter M. Kelly, President, Commercial Factors Corp., Two Park Avenue, New York 16, N. Y.

Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Destructive Taxation: The $64,000 Question

▪ The television program "The $64,000 Question" has dramatically brought to the attention of the American people the destructive character of our present federal tax laws.

As pointed out by the National City Bank in its October, 1955, letter, in the case of a single person with a $4000 income from other sources, a winning of $32,000 is taxed $15,400, leaving the winner $16,600.

An additional $32,000 would be taxed $23,292, leaving the winner $8,708.

For a person to have and keep $64,000 after paying the income tax would require a prize of $448,711.

Our present income tax law imposes taxes on individuals starting with 20 per cent on incomes of $2000 and under and increasing with the size of the income to 91 per cent.

Coupled with our federal estate tax running to a top rate of 77 per cent, we have an ideal scheme for destroying the private enterprise system under which the individual, and not the government, provides the capital and owns and operates our industries. The effect is to lessen or destroy the incentive to work, save and invest in productive enterprises, which is so essential to our continued progress and prosperity.

As in the case of the "$64,000 Question", persons hesitate to invest in business enterprises, and business men hesitate to embark upon new ventures, because of the loss involved in the event of failure and the confiscatory taxes levied in the event of success. The ultimate effect is certain to be disastrous.

The "disincentive" effect of the high tax rates is shown by the following figures:

One half of the total federal revenue of $60 billion is provided by the tax on individual incomes. Only 3 per cent of the total revenue (about $2 billion) is produced by the rates of this tax above 34 per cent. Incidentally, 35 per cent is the highest rate that could be imposed (with the present beginning rate of 20 per cent) under the Reed-Dirksen Amendment now pending in Congress, which limits the power of Congress to tax incomes, inheritances and gifts.

The $20 income tax cut for all taxpayers and dependents proposed in the last session of Congress would have cost the government a revenue loss of $2 billion 300 million.

Eighty-four per cent of the revenue from the individual income tax is produced by the beginning rate of 20 per cent.

The estate and gift taxes produce a little over 1 per cent of the total revenue (less than $1 billion),—enough to run the government for about four days.

The Reed-Dirksen Amendment limits the degree of tax-rate progression in the case of the income tax without impairing the power of Congress to raise needed revenue during either war or peace and reserves to the states the exclusive power to impose death and gift taxes. It is a much needed reform.

ROBERT B. DRESSER
Providence, Rhode Island

"House Counsel" an Excellent Article

▪ This is to express my appreciation for the excellent article by Mr. Stephen E. Davis entitled, "House Counsel: The Lawyer with a Single Client" which appeared in the September issue of the AMERICAN BAR ASSOCIATION JOURNAL. Mr. Davis has written an admirable article and is to be commended.

ANDREW P. STEPHANS
Houston, Texas

The First Code Was in Georgia

▪ In Mr. Oliver Schroeder's excellent article, "Comparative Law: A Subject for American Lawyers", in the October, 1955, issue of the JOURNAL, I noted the statement on page 929 that "David Dudley Field, who authored the first code as a legal reform for the states of the union used the *Code Civil* of France as his model".

We Georgia lawyers claim for our own state the honor of the first codification of the common law. I quote the following from an article titled "The Common Law and Its First Codification by Thomas R. R. Cobb" by William F. Jenkins, Chief Justice Emeritus, Supreme Court of Georgia, in the November, 1953, *Georgia Bar Journal*, Volume 16, pages 144, 145. "A similar code commission was appointed by the state of New York in the same year that Georgia named hers. It was headed by the illustrious lawyer David Dudley Field. The New York Commissioners reported back to their Legislature in the year 1865—five years after the Georgia Code had been adopted by its General Assembly, and two years after it had gone into actual operation. Even then, this New York Code proposal was rejected by the New York

(Continued on page 109)

Views of Our Readers

(Continued from page 104)

Legislature, save only as to that portion relating to Procedure. In later years, Field's Code was adopted, common law and all, more or less in toto, by a number of other states. Field has stated that, owing to the outbreak of the Civil War and the isolation of the South, he had not even heard of the Georgia Code. It is thus seen that on the question of priority, Cobb stands on solid and indisputable ground. . . . Field was not only famous and learned, but in an effort to be scrupulously fair, he published an article in the year 1872 in a law journal expressly giving the first Georgia Code priority in the codification of the Common Law."

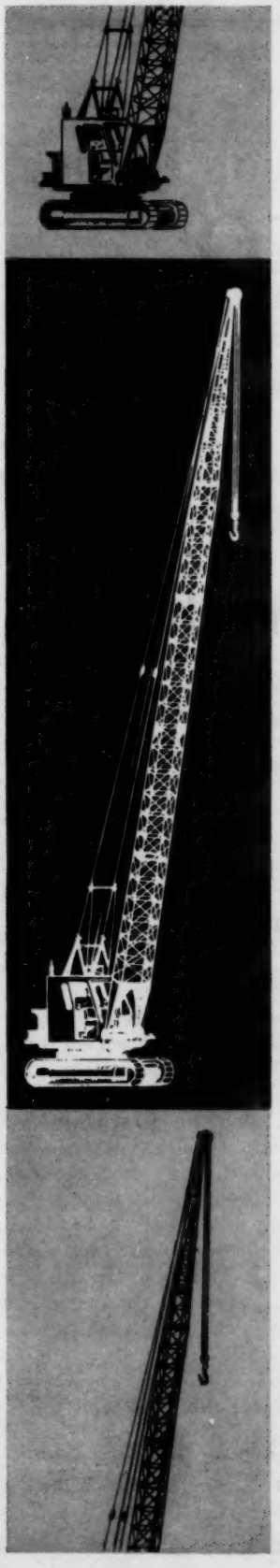
ROBERT L. RIVERS
Atlanta, Georgia

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes or any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet this requirement.

Manuscripts are submitted at the sender's risk, and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. A period of at least four weeks is usually required for the consideration of material and two months is not uncommon. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.



if you have a client with

CONSTRUCTION EQUIPMENT

to dispose of

- you can sell it *promptly*
- you can sell *all* of it
- you can get the *highest total* money for *all* of it

at a **FORKE BROTHERS AUCTION**

The Auction Firm of FORKE BROTHERS has been in the professional auction business for over 35 years. They have the "know-how" and the ability to perform the one service which is necessary to make a sale—bring the seller and the buyer together on terms which are agreeable to both—those terms are simply the fair market price—determined by competitive bidding. Buyers and sellers alike have the assurance of an honest, fair and dignified sale.

Forke Brothers have sold thousands of pieces of heavy equipment. Their operation is not confined to any one area or section—they work all over the United States and Canada. This, of course, keeps them in close contact with the entire market. Forke Brothers KNOW the equipment market—they know its needs and they know its values.

Based on years of experience, Forke Brothers know how to advertise equipment for sale, to reach a maximum number of potential buyers for any particular type of equipment.

If you have a client with equipment to sell or equipment to be appraised for an estate or other purposes, it will prove profitable for you to inquire of Forke Brothers for their "Plan of Auction" and appraisal service. Full details are yours for the asking—plus a list of owners in almost every section of the country for whom Forke Brothers have sold. Write, wire or phone collect. No obligation, of course.

Equipment Auction Leadership since 1921

FORKE BROTHERS

The Auctioneers

321 Sharp Bldg. Lincoln, Nebraska Phone 2-1045

Capital Punishment:

A Sharp Medicine Reconsidered

by Evelle J. Younger · *Judge of the Municipal Court of Los Angeles*

■ **Capital punishment is older than recorded history, and it was apparently accepted without question for many centuries as a perfectly natural form of punishment. In modern times, however, both the wisdom and the humanity of such drastic retribution have been challenged. Judge Younger has written this article re-examining the whole question of capital punishment, its historical background and the arguments pro and con.**

■ "It is sharp medicine", said Sir Walter Raleigh, as he tested the keen edge of the axe while awaiting execution. Since 1618 we have changed the medicine, utilizing allegedly more humane methods, and have greatly limited the occasions which call for such drastic treatment; but executions are still carried out by the state in the name of justice and argument concerning the death penalty continues. Bills outlawing or further limiting capital punishment were introduced again this year in the California State Legislature.[1] Also, the unfortunate circumstances surrounding the execution of Barbara Graham and the details concerning the frequent stays of execution granted in the Chessman case have become matter of common knowledge. Consequently, and fortunately, our citizens—both lawyers and laymen—have shown increased interest in this problem of capital punishment during these past few months. I say "fortunately" because public interest encourages official attention. The more we study this problem, the more we learn; the more we learn, the closer we come to answering the $64 question.

Capital Punishment . . . *The Historical Aspect*

Before considering that question, some attention must be devoted to the historical aspect of capital punishment. We should realize that our reaction to the executions carried out by our predecessors may be prophetic of the reaction that our successors will have to our present-day system. Bloody Queen Mary, who caused thousands of executions, undoubtedly was activated by the noblest motives. The lawyers and judges who participated in the Salem witchcraft trials would strenuously resent any suggestion that we are more honorable or conscientious than they. If we can't claim more noble motives, we can at least hope that our judgment as reflected in our system of punishment better stands the test of time.

Originally the death penalty rested primarily upon man's effort to placate the gods, lest their beneficent solicitude for the group be diverted as a result of apparent group indifference to the violation of the social codes supposedly revealed by the gods. The complete blotting out of the culprit was a practical demonstration of group disapproval. Later the individual came to be looked upon as a scoundrel, capable of free choice in every aspect of his conduct, who had wilfully chosen to do wrong. The theory of capital punishment which evolved in this period was based on man's natural desire to return blow for blow, injury for injury. In order that desire for revenge would not develop to the point where every killing resulted in family feuds and wars of varying sizes, restrictive laws were introduced. Gradually, it was realized that crime was more than a personal affair between guilty party and victim, and the state took over the responsibility for punishment. Action was still purely retaliatory. Later, however, the concept developed that in punishing, the state provided protection against potential injury. A penal system evolved, featuring three clearly defined aims: (1) prevention, (2) punishment and (3) indemnification. It was contended that only the death penalty achieved these objectives. As deterrence

1. Assembly Bills 2089, 2090, 2091.

ranked higher and higher, more and more crimes became capital crimes. Torture before, and degradation after, were added to the punishment of death.

According to the Bible, the punishment of death was inflicted for a large number of offenses against the laws of Moses. Among these offenses we find, on the one hand, so serious a crime as murder, and, on the other, so petty an offense as gathering sticks on the Sabbath day. Later, when the population was sparse and men were needed for armies, executions were rare. William the Conqueror, for example, used the death penalty only to punish conspiracy against his rule. His successors, however, reintroduced it for other crimes, and the pendulum swung. In the days of Blackstone there were 160 different felonies for which the penalty was death. The trend continued until there were 222 capital crimes (including the shooting of a rabbit, the theft of a pocket handkerchief and the cutting down of a cherry tree). Only in the last century has there been definite and permanent recognition of the supreme value of life to the extent that capital punishment has been virtually restricted to the crime of murder.

Notwithstanding other indictments we may level at those responsible for the bloody orgies of the past, we cannot deny that they possessed imagination.

Included among the earliest methods of execution were crucifixion, stoning, poisoning, starvation, drowning and burying alive. Condemned criminals were sawed or chopped in two while still alive by the ancient Persians, Hebrews and Chinese. Flaying (skinning) alive was a common method of execution in the Far East. The European variation on this method involved the victims being subsequently impaled; *i.e.*, stuck on a sharp stick. Another Oriental favorite consisted of the victims being eaten alive by insects or sewn in a bag with poisonous snakes. The Chinese "torture of the knife", the Japanese "execution of the twenty-one cuts", and the Peruvian method described as "slicing to death" all involved the victims being cut to pieces as slowly and painfully as possible. From 1426 to 1772 criminals were sometimes pressed to death in England. This method was also used at Salem in 1592 during the witchcraft trials. Boiling, which had at one time been in frequent use by the Chinese, became the punishment for poisoning in England in 1530, and was used on the Continent from the thirteenth to the sixteenth centuries, although some rulers considered frying preferable to boiling.

"Drawing and quartering", French style, involved pulling the criminal literally to pieces, after preliminary torturing, utilizing four of the strongest horses available. "Breaking on the wheel" was popular during the eighteenth century in France and Germany. The customary procedure was to bind the criminal, face up, to a large wheel and beat him to a pulp with a sledge hammer or iron bar.

Burning alive was one of the first and most widely used methods of execution. We find mention of it in the Old Testament as a punishment for incest and prostitution. Every year during the Holy Inquisition scores of persons were burned at the stake. The Protestants adopted a similar method in dealing with those who plotted against the true faith. Burning was by no means reserved for heresy, however. Witchcraft in particular was punished in this manner.[2]

An Honorable Death . . . *Execution by Beheading*

Beheading is one of the most ancient and popular of all forms of capital punishment. It was used by the ancient Greeks, Romans, Egyptians, Chinese and Japanese. Here again there were variations. The method most susceptible of error on the part of the executioner involved the use of a rather light sword and required considerable strength and good timing—so much so that the condemned on occasion would offer a bonus should the man handling the knife sever the head with one stroke.[3] There were many cases of bungled executions. This unfortunate situation led the French Government to seek advice from the Secretary of the French Academy of Surgery, and resulted in the development of the guillotine in 1792.

Like beheading, being shot to death by a firing squad is considered an "honorable" way to die; and this method is and has been for many years favored in the case of a military execution. Hanging, on the other hand, is considered a dishonorable way to meet death. This distinction seems to me to be highly academic.

Hanging, in many and varied ways, has been the most popular, if not the most foolproof, method of execution. In England the practice developed of letting the bodies hang and rot in order to bring the message more forcefully to the populace. Early hangings resulted in death by strangulation. The modern method, dating from the time the "long drop" was originated, consists of dislocation of the neck, by breaking the spinal cord. An executioner named Berry, in Yorkshire, did considerable research to the end that the drop should be long enough to bring about "instantaneous death" but not so long as to cause mutilation; and he published a "drop table" in 1885, containing considerable helpful information concerning the rope, scaffold, technique, etc.

Centuries ago animals were treated like human beings—or vice versa. Pigs, horses and cattle were frequently executed for murder.[4] In 1474 a *male* domestic fowl was tried "for the heinous and unnatural crime of laying an egg", and sen-

2. The usual procedure was to strangle the criminal immediately before lighting the fire. In this connection, Blackstone says: "But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty . . . there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned till previously deprived of sensation by strangling."

3. The Autobiography of Sir John Bramston, K. B. (Camden Society, London, 1845) page 192.

4. E. P. Evans, The Criminal Prosecution and Punishment of Animals (Heineman, London, 1906) page 140.

tenced, together with the egg, to be burned at the stake.[5] In cases of bestiality, both the man and the animal, on being found guilty, were sentenced to death, usually both being burned alive together. Inanimate objects were sometimes tried and executed (*e.g.*, "haunted house", wherein a murder had occurred). Allied to the capital punishment of animals and inanimate objects was the practice of disinterring human corpses for the purpose of posthumous execution, sometimes by hanging, in other cases by burning. Today we utilize all our resources to keep a condemned man healthy till the fatal day; but if he should die, or manage to commit suicide, we dispense with the formality of execution.

Penological reform started with the repeal of torture as an additional punishment and continued with the repeal of capital punishment for petty crimes, eventually leaving murder as the most outstanding of the few crimes involving the death penalty. The trend throughout the world appears to be toward the abolition of the death penalty. In approximately thirty countries the death penalty has been eliminated by law or tradition.

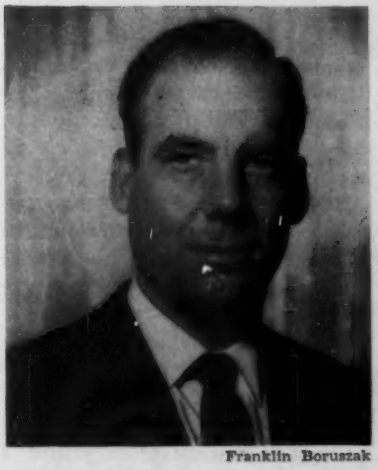
There has been a fluctuating tendency toward abolition in the United States. From the first, America has had fewer "capital" crimes than England. The English colonies in this country had from ten to eighteen capital offenses. Today there are seven capital crimes, excluding treason, in the forty-eight states. California lists five in addition to treason.[6] In this connection it is interesting to note that all of the 110 men executed in California from 1938 to 1953 were sentenced to death for the crime of murder in the first degree.[7]

The death penalty may now be imposed by forty-two states, the District of Columbia and the Federal Government. Of these, thirty-five states and the United States provide that the jury shall determine when the death penalty is to be imposed; four states provide that the jury may recommend the death penalty, but the judge is not bound by the recommendation; and three states *require* capital punishment. Twenty-six of the thirty-five states (and the Federal Government) that allow the jury to determine punishment divide murder into degrees and allow the death penalty only in the case of first-degree murder. Nine states abolished the death penalty but later restored it, with life imprisonment as an alternative. One state, Maine, abolished, restored and again abolished the death penalty.

Electrocution, hanging, lethal gas and shooting, are, in the order of their popularity, the methods of execution in the United States. The electric chair was first used in New York in 1890. Twenty-two states now use this method of execution. Eleven states execute by hanging. Eight states, including California, use the gas chamber. Lethal gas is reputedly the most humane method of execution. There is considerable argument on this point, however; and unfortunately, there are no living experts available to settle the dispute.[8]

The Modern Trend . . .
No Capital Punishment

The trend toward abolishing capital punishment is also reflected in the fact that only a small percentage of those persons who commit murder are actually executed. Most murderers are never sentenced to death, and many who are sentenced to death manage in one way or another to escape that penalty. Statistics on this point are not consistent and are obviously not completely reliable. Raymond T. Bye,[9] basing his figures on 1917 statistics, says that one man in seventy who commits a homicide in the United States suffers death for it. Warden Lewis E. Lawes[10] sets the figure at 1 in 85. Harry B. Chamberlin, Operating Director of the Chicago Crime Commission and an ardent supporter of capital punishment, utilizing Cook County figures for the year 1921, found that less than 3 per cent of those who committed murder were executed.[11] Dr. Joseph Catton, clinical professor of medicine at Stanford University, in his book *Behind the Scenes of Murder*, takes the homicide rate for 1938 and shows that only 1.8 per cent of the murderers were executed. In 1953 there were sixty-two persons executed in the United States. In that same year there were over 7000 cases of murder and non-negligent manslaughter.[12] At that rate the criminal's chances of escaping execution are better than 100 to 1. Obviously Not every homicide is willful mur-



Franklin Boruszak

Evelle J. Younger studied law at the University of Nebraska (A.B. and LL.B.) and Northwestern, then entered the F.B.I. A veteran of World War II and the Korean War, he is presently a colonel in the U.S.A.F. Reserve. Before appointment in 1953 to the Bench by Governor Earl Warren, he served as Deputy City Attorney of Los Angeles, as City Prosecutor in Pasadena, and taught criminal law at Southwestern University Law School in Los Angeles.

5. Evans, page 162; see also S. Baring Gould, CURIOSITIES OF OLDEN TIMES (1869).

6. First-degree murder (P.C. 190); kidnapping (P.C. 209); train wrecking (P.C. 219); perjury in a capital trial resulting in the execution of an innocent person (P.C. 128); and assault by a life prisoner (P.C. 4500).

7. Robert M. Carter, CAPITAL PUNISHMENT IN CALIFORNIA; 1938-1953, thesis, University of California School of Criminology.

8. See Nicola Tesla in the NEW YORK WORLD, November 17, 1929, and the SAN DIEGO SUN, December 3, 1938.

9. CAPITAL PUNISHMENT IN THE UNITED STATES.

10. MAN'S JUDGMENT OF DEATH (1924) page 34.

11. PROCEEDINGS OF THE ANNUAL CONGRESS OF THE AMERICAN PRISON ASSOCIATION (1922) page 561.

12. National Prisoner Statistics, Federal Bureau of Prisons.

der, but even if half of them can be so classified, the odds favoring the criminal are still fifty to one. In California, during the ten-year period 1945-1954, there were at least 3500 homicides compared to eighty-seven executions.[13]

Still further evidence of the growing reluctance to execute criminals is found in statistics relating to the time which passes between a sentence of death and actual execution. Undoubtedly, most of the time is consumed by conscientious lawyers and judges working tirelessly to eliminate any possible error and prevent a miscarriage of justice. I suspect, however, that some of the delay can be blamed upon a natural reluctance on the part of an appellate court judge to take action which would cost a human life when there is any legal justification, however slight or obscure, for referring the matter to an entire court or higher tribunal. I hope this suggestion does not offend any of my superiors. Actually, if I were a supreme court judge and if someone were to accuse me of being sentimental, I would not be insulted. Sentiment and practical common sense exist side by side in every decent human being. Only Nazism, Communism and similar totalitarian doctrines rule out all sentiment as a reason for human action. In any event, for whatever reason, it does take a long time to execute a criminal. You may remember the *Sacco-Vanzetti* case. They were arrested on May 5, 1920, tried in May, June and July, 1921, and executed on August 23, 1927. Here in California, Caryl Chessman, on January 22, 1948, committed the crime for which he was sentenced to death on June 25, 1948; and he is still alive in "Death Row" today. These are admittedly exceptional cases. Let's examine the statistics then covering the period 1938 to 1953 in California. One hundred and ten persons were executed. Each one spent an average of sixteen months in condemned status—the range was from six months to six years, one month. Five men each spent over 1000 days in Death Row.[14] This is about par for the course, although it may seem at times that the wheels of justice move at an exceptionally slow rate of speed in California. Twelve federal prisoners were executed throughout the United States during the ten-year period from 1945 through 1954. Each prisoner spent an average of 16½ months in condemned status. Bonnie Heady and Carl Hall were executed in less than a month. Excluding them, the average time elapsing between sentence and execution was 19½ months.[15]

A Biblical Sanction . . . *The Arguments Pro*

The arguments in favor of capital punishment are quite persuasive. The abolitionists have no copyright on the Bible, as the following quotations indicate: "Whoso sheddeth man's blood, by man shall his blood be shed."[16] "He that killeth with the sword must be killed with the sword."[17] Many New Testament references recognize the divine appointment of human government, and the validity of the penalty of death.[18] Eminent theologians assert that quotations used by the abolitionists are wholly misapplied when used against capital punishment and the penal institutions of lawfully constituted governments, whose authority was never challenged by Christ.[19]

The swift and certain execution of the ancient law, punishment by a means bearing a just proportion to the enormity of the crime, is the best deterrent known. Death is still the king of terrors, and the only terror that holds some men in check. Under the modern system of pardons and paroles, turkey dinners and cadet uniforms, there is in reality no such thing as life imprisonment. The fiends are often released, only to commit more murders. There is too much loose talk about the sacredness of human life. A life is sacred only when it makes itself sacred; when it respects the lives and rights of others. Capital punishment should be abolished, but not until the murderers of the world abolish it first. Desperate murderers, like venomous reptiles and wild beasts that prey on men, should have no place in the society of peaceful men. A cold-blooded murderer, having cunning intelligence without moral restraint, is infinitely more dangerous than any other animal on earth. Why slay the man-eating tiger and carefully preserve the human beast?

Although capital punishment does not restore the life of the murderer's victim, neither does any other punishment. The death of the murderer, however, does secure society against him. Too many persons indulge themselves in gushing sentimentalism over criminals. They overemphasize the fact that life, education and environment are the forces that victimize and penalize every criminal. If society is wholly responsible, why not apologize to the cutthroat and pension him for life? If you don't hang him, why imprison him? He surely needs neither gallows nor cell if the blame is all on the universe at large.

The death penalty cannot be condemned as ineffective in those jurisdictions where persons in authority fail consistently to invoke the penalty. Those states which have abandoned capital punishment without a resulting increase in the murder rate had failed for a long period prior to its final abolition to enforce the penalty effectively. Uncertain, tardy justice is the cause of most anarchist outbreaks in which lynchings occur.

Even the most ardent advocates of life imprisonment as punishment for murder admit, without hesitancy, that it is necessary to provide the death penalty for murders committed by men under life sentence. This

(Continued on page 196)

13. Statistics supplied by the California State Department of Corrections.
14. Robert M. Carter, *Capital Punishment in California* 1938-53, thesis, University of California School of Criminology.
15. Statistics supplied by the United States Department of Justice.
16. Genesis, IX:6. See also Exodus XXI:12, Leviticus XXIV:17, and Numbers XXXV:30-31.
17. Revelation XIII:10.
18. See Romans XIII:1-4 and Acts XXV:10 and 11.
19. See By Right of Sword, by Leigh H. Irvine, (1915) page 17.

Pedestrianism:

A Strange Philosophy

by Lewis C. Ryan and Bruno H. Greene • *of the New York Bar*

■ **The authors of this article are strongly opposed to the substitution of the principle of "liability and limited compensation without fault" for the deeply rooted legal principle allowing recovery of full damages for actionable wrongs causing motor vehicle accidents. Proposals that some sort of "workmen's compensation" be provided for the victims of such accidents are not new. Last fall, the Saturday Evening Post in an article by Judge Samuel H. Hofstadter, of New York, gave wide publicity to the alleged merits of "administrative compensation" in such cases. In rebuttal, Messrs. Ryan and Greene point out the many fallacies of this remarkable Utopian scheme.**

■ "WANTED: 72 MILLION AMERICAN MOTORISTS TO PAY FOR ANY INJURY CAUSED BY AN AUTOMOBILE TO ANY PERSON, SOBER OR DRUNK, REGARDLESS OF FAULT." The hue and cry is on again to place full responsibility for deaths and injuries on our highways, not on those whose actions or omissions are responsible for the event, not even on those who, as in the case of industrial accidents, by operating a business or enterprise have provided an opportunity for such an event to happen, but on those who are completely disconnected with the accident, have never heard of it or of the parties concerned. Why? Because the advocates of the various automobile accident compensation plans maintain that fault, if any, "is one chargeable to a society which 'negligently' tolerates dangerous locomotion"[1] or because the driver is responsible "by his very presence on the highway. . . ."[2] Thus, the pedestrian obviously becomes the only angel in the picture, and "pedestrianism" the only ethical philosophy.

More than twenty-five years ago, Austin J. Lilly, General Counsel of the Maryland Casualty Company, wrote: "There is something almost sinister in the ruthless pursuit of American motorists, culminating in this proposal to put them all, owners and operators alike, in a semi-outlaw class . . . to impose upon them all, collectively, a vicarious responsibility for the faults of pedestrians and passengers. . . ."[3]

More concretely, the apostles of "Compensation at the Expense of the Innocent", generally speaking, offer three basic reasons for their desire to substitute such compensation for our system of liability of those responsible:

1. Automobile accidents are inevitable. Hence, the principle of "no liability without fault" has outlived its usefulness.

2. "Justice delayed is justice denied". Our court calendars are congested. The courts cannot cope with personal injury litigation. Hence, these cases should be removed from the courts and entrusted to an administrative board for expeditious awards to the injured.

3. Financially irresponsible motorists are causing a considerable number of injuries. Resort to a compensation fund would guarantee recovery to their victims.

In the face of a mounting toll of injuries and death caused by automobiles on our streets and highways, many remedial suggestions have been made and several of them have been adopted in a number of American jurisdictions, some with more, others with less success. Among them are such remedies as compulsory insurance plans, safety responsibility laws, legislation providing for unsatisfied judgment funds in various forms, etc. But the most radical plans, to date not adopted in any state of the Union (although one is in operation in Saskatchewan, Canada, the only area in the Americas), are the Automobile Accident Compensation Plans, compelling compensation regardless of fault. To those alone the scope of this article is limited.

I. The "Plans"

All compensation plans show, substantially, the same features. They are all based on "liability without fault" and the benefits they offer are patterned after those of workmen's compensation laws. Among the most

1. Ehrenzweig, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM, page 3 (1954).
2. Marx, Reply to *The Case against Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 157, 159 (1954).
3. Lilly, COMPULSORY AUTOMOBILE INSURANCE, COMPULSORY COMPENSATION FOR MOTOR VEHICLE INJURIES AND MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAWS, Association of Casualty and Surety Executives, page 53 (1930, as reprinted in 1932).

notable forerunners of the "Columbia Plan[4]" are the suggestions contained in the speeches and writings, published around 1924 and 1925, by Judge Robert S. Marx[5], and, in New York, the Straus-Cuvillier Bill, repeatedly submitted to, but never adopted by the New York Legislature[6].

The "Columbia Plan" itself, or, as it is sometimes referred to, the "Ballantine Report", named after the chairman of the committee which prepared it[7], is by far the most detailed and ambitious plan of them all. A good summary of its provisions was prepared by Professor Young B. Smith[8].

The Plan does not cover property damage, excludes compensation to owners and operators whose injuries were not caused by another motor vehicle[9], and is "exclusive", in that it deprives the injured person of his right to recovery in tort. No compensation is paid in any case, however serious, for pain and suffering. For business and professional men, profits take the place of wages in the calculation of awards. For certain groups of non-wage-earners minimum wages are "assumed"[10] The committee estimated that the cost of this compensation plan would increase the then prevailing rates paid by motorists for public liability insurance by approximately 61 per cent[11].

Two studies, following on the heels of the "Columbia Plan", arrive at basically similar conclusions. One was published by a committee headed by Shippen Lewis of the Philadelphia Bar, in 1932[12], the other is a book by Patterson H. French, entitled *The Automobile Compensation Plan* published in 1933 and covering the State of New York.

For the State of Wisconsin, Ray A. Brown prepared an interesting study on a much smaller scale than the Columbia Report, in 1935[13].

The only automobile accident compensation plan actually in operation in the Americas is now in effect in the Province of Saskatchewan, Canada. This plan differs from the other models mainly in that it includes compensation for property damage up to a small amount and reserves to the victim, in addition to his right to compensation, the right of action in tort, if he alleges negligence on the part of the injurer. The scale of benefits offered has been discussed by Judge Marx[14]. The average premium for a car five to six years old is said to be approximately $20 a year[15].

Recently a number of legal writers have again revived the propaganda for various types of compensation plans. Among them are:

1. Judge Robert S. Marx, the indefatigable exponent of compensation, who again vigorously advocates abandonment of the fault doctrine as being "a legal fiction" and rejects other measures as "hasty attempts to cover the open sores which the voluntary liability system has left upon society".[16]

2. Professor Albert A. Ehrenzweig[17], who proposes a *voluntary* accident insurance for owners and operators of automobiles in statutory minimum amounts, in return for such persons' freedom from common law liability for ordinary, not criminal, negligence[18].

3. Judge Samuel H. Hofstadter[19], who rejects liability for fault as "unrealistic" and maintains that "society must accept collective responsibility for such accidents".[20]

II. The Merits

Liability regardless of fault is the "darling of . . . theorists who dwell in Halls of Ivy".[21]

We most emphatically believe in the wisdom and full applicability of the rule announced by Holmes in 1881: "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instru-

4. *Infra.*

5. Marx, *The Curse of the Personal Injury Suit and a Remedy*, 10 A.B.A.J. 493, (1924). For details and some modifications see also Marx, *Compulsory Automobile Insurance*, 11 A.B.A.J., 731 (1925); Marx, *Compulsory Compensation Insurance*, 25 Col. L.R., 164 (1925).

6. See Lilly, *supra*, note 3, at 15, where a brief summary of some other early "plans" may be found.

7. *Report by the Committee To Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences* (1932).

8. Smith, Dowling and Lilly, *Compensation for Automobile Accidents: A Symposium*, 32 Col. L.R. 785, 798-803 (1932) .

9. *Supra*, note 7 at 140.

10. For other details of the compensation schedule see Smith, *supra*, note 8 at 800. Professor Smith recognizes that "the suggested scale of compensation is the most vulnerable feature of the plan as outlined", and points particularly to the fact that "a considerable number (of injured) are persons with much greater earning power and income than is to be found in the groups covered by workmen's compensation acts."

11. *Supra*, note 7 at 156, 213, 288.

12. For a summary of this plan, see Kilroe, *Necessity for Preservation of the Judicial Process in the Interest of Persons Injured in Automobile Accidents*, 25 N. Y. State Bar Bulletin 315, 316 (1953).

13. *Automobile Accident Litigation in Wisconsin: A Factual Study*, 10 Wis. L.R. 170 (1935). Mr. Brown concludes: "The writer is of the opinion that on the whole, it would be undesirable at the present time to apply the compensation plan to automobile accidents."

14. *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 Ohio State L.J. 134, 141 (1954).

15. According to McVay, *Reply to "The Case for Compulsory Automobile Compensation Insurance"*, 15 Ohio St. L.J. 161, 166. Mr. McVay also points out that "the deductible for the fire, theft, collision and property damage coverage was increased in 1953 from $100 to $200. Despite this, and despite the fact that the fund furnished meager benefits for a population of less than 1,000,000 people, it was reported to have a deficit of $1,600,000 as of April 1, 1953", citing the National Underwriter, No. 8, page 1. The adoption of the Saskatchewan plan was advocated by Frank P. Grad in *Recent Developments in Automobile Accident Compensation*, 50 Col. L.R. 300 (1950). For further evaluation of the Saskatchewan plan, see *infra*.

16. *Supra*, note 14 at 140. This article was answered by C. D. McVay, President of the Ohio Farmers' Companies and of the Medina County Bar Association in *The Case Against Compulsory Automobile Insurance*, 15 Ohio State L.J. 150 (1954) which drew a reply by Judge Marx, *ibid.* 157, which, in turn, was answered by Mr. McVay, *ibid.* 161.

17. *Supra*, note 1.

18. For a criticism of this plan, see a book review by Professor William B. Lockhart in 39 Minn. L.R. 344 (1955). Professor Lockhart particularly points to the "absence of any analysis or even an informed estimate as to the cost of (the) proposed system compared to the costs under the present system of liability based on negligence, backed by liability insurance" and attacks the proposal to compensate surgical care and hospitalization in fixed percentages.

19. *Traffic Jam in the Courts*, N. Y. Times Magazine, February 21, 1954 and *Let's Put Sense in the Accident Laws*, Saturday Evening Post (October 22, 1955) 17, *et seq.*

20. For a recent study, sponsored by the Yale Law School and limited to recent automobile injuries in New Haven, Conn., see James and Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 Conn. B. J. 70 (1952). See also McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N. Y. U. L. R. 585 (1952). The authors of the last mentioned article, while recommending the assurance of minimum benefits without regard to fault, wish to reserve to the victim the right to a tort recovery, if he can prove negligence.

21. Murphy, Observations on the Future of Insurance, Awards and Compensation 15 (1952).

ment of misfortune."[22]

We just as emphatically submit that the recognized modern trends toward extension of liability with respect to manufacturers and suppliers of chattels, owners and occupiers of land, governmental and charitable immunity and vicarious liability as well as in the field of workmen's compensation have not detracted from the validity of Holmes's statement, because even under those principles the loss will, in a sense, "lie where it falls." But what the proponents of the automobile accident compensation plans suggest is not such an extension, but a complete distortion and perversion of this basic tenet by placing liability on those who, not even by a gigantic stretch of the imagination, can be brought within the purview of a loss suffered. Regardless of anyone's views with respect to a justification of the above extensions, they have been adopted because the loss occurred at least within what might be termed "the sphere of endeavor" of the party held liable, whereas the liability of a whole class, whose members have nothing in common except ownership of an automobile, for any injury caused by any such member, has not even the remotest connection with their "sphere of endeavor".

We are told that automobile accidents are "inevitable", hence it is futile to determine who caused them. Rather than implying that "inevitable" means that it is inevitable that accidents will happen, the propounders of inevitability are painting for us the picture of all motorists, unfortunate victims of our mechanized society, helplessly lashed to a demoniacal machine, carrying them whither they do not know but certainly to some of their fellow-motorists' or pedestrians' "inevitable" doom. It is obvious that this is not so and that the human element, human actions or omissions, are responsible for automobile deaths and injuries.[23] But, instead of trying to devise proper ways of improving the methods of recovery from those whose human failings, however understandable, caused the loss, we are told that the loss by itself is sufficient justification to hold all motorists liable.

Why do they stop at automobile accidents? They are by no means the most numerous ones. Even though Judge Marx wishes to brush the non-automobile deaths and injuries off as "bathtub" cases without social significance, the fact still remains that out of a total of 9,140,000 accidental deaths and injuries in 1954, 7,854,000 were non-automobile accidents and 1,286,000 deaths and injuries were caused by automobiles in the entire country.[24] Is not the cry that the automobile is the number one killer the fundamental basis of all compensation plans? Who should pay for those eight million cases? But then again, why stop here? Shouldn't we create a compensation fund for victims of non-collectible rubber checks? Negotiable instruments are as much part of the equipment of our modern society as is the automobile. And, if we are to protect the negligent victim of an automobile accident, the drunken pedestrian running into the rear of a slowly moving car, the jay-walker, the speedster or other reckless driver, all of whom are promised compensation, why not protect the negligent drawer of a check who, by a slight oversight drew the instrument so as to facilitate a material alteration and who, as a result, cannot recover the excess amount paid out by the drawee bank? A quotation from one of Dean Roscoe Pound's articles may be appropriate in this connection:

> But now we have newly asserted grounds of liability responding to a claim of the individual who suffers loss to have a full economic and social life provided for him. If the state, in the pressure of broad welfare plans upon public revenues, cannot repair the loss directly and immediately, it is to find someone who can.

And again:[25]

> What seems to be developing as a jural postulate is: In civilized society men are entitled to assume that they will be secured by the state against all loss or injury, even though the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on someone better able to bear it. This suggests at once a variant of the Marxian axiom: To everyone according to his wants; from everyone according to his means. From each according to his abilities, to each according to his needs.

On the day the novel plan of automobile liability regardless of fault was born, all the well-wishers and pundits looked at the baby with a great deal of affection, and then all cried: "Why, if she isn't the spit and image of dear Workmen's Compensation! Well, she hasn't got the same nose and she hasn't got the same eyes, but her ears sure look exactly like good old Workmen's Compensation's. He must be her father. Let's assume he is, anyway. And from now on we shall proclaim to the world that they are exactly alike. Like father, like daughter!"

Is there a real analogy beyond a similarity in outer trappings? We submit there is not, and, what's more, the dissimilarity is obvious.

Let us only briefly summarize the outstanding features in the industrial relationship, which is subject to workmen's compensation, the absence of which in the case of parties involved in an automobile accident is evident. Those points of distinction have been very aptly demonstrated elsewhere.[26]

22. Holmes, THE COMMON LAW 94 (1881).

23. Mechanical defects could be shown as having played a part in the accident in only 0.25 per cent of cars involved. Canning, *Motor Vehicle Inspections . . .*, 74 AUTOMOTIVE INDUSTRIES 336 (1936).

24. ACCIDENT FACTS, National Safety Council, 3 (1955). In terms of numbers of accidents, taking the State of New York as an example, and comparing work-accidents with non-work accidents, those reported by employers to the N.Y.W.C. board alone numbered 841,005 in 1953, whereas the total of reported automobile accidents resulting in personal injury or death in New York during the same period was 114,062. STATE OF NEW YORK WORKMEN'S COMPENSATION BOARD ANNUAL REPORT 11 (1953) and NEW YORK BUREAU OF MOTOR VEHICLE SAFETY RESPONSIBILITY ANNUAL REPORT 2 (1954).

25. *Law in the Service State: Freedom versus Equality*, 36 A.B.A.J. 977, 981, 1050 (1950).

26. See especially Lilly, in *Compensation for Automobile Accidents:* A Symposium, II. Criticism of the proposed solution, 32 COL.L.R. 803,805-812; Address by Ray Murphy, General Counsel of the Association of Casualty and Surety Companies, delivered at the Institute on Personal Injury Litigation at Dallas, Texas, November 14, 1952; Sherman, *Grounds for Opposing the Automobile Accident Compensation Plan*, 3 LAW AND CONTEMP. PROBLEMS 598 (1936).

(a) Workmen's compensation does not operate regardless of how the accident occurred. It must have arisen out of and in the course of employment.

(b) The employer can and does pass on the cost of insurance to the consumer.

(c) Compensation loss under workmen's compensation can be weighed against the cost of accident preventive measures, thus inducing the introduction of such measures.

(d) There is privity of contract between employer and employee.

(e) Workmen's compensation does not operate where the worker injures the employer.

(f) A full investigation of the facts on which compensation depends can be launched immediately in an industrial establishment, with the benefit of witnesses and other means of proof and verification.

(g) Awards under workmen's compensation are the same for the president and the office boy, for the wealthy and the poor. "This leveling process applied to wage-earners is believed to be justifiable in workmen's compensation, since they occupy in general the same economic field, variations in which, though important in the individual case, are not important when the whole field is under consideration. It is believed to be totally without sanction under our present system of laws when applied to all those (50 per cent or more of the victims of automobile accidents) who do not come within the wage-earning field."[27] One industrial manager put it this way: "We know what to expect when we hire Joe Doakes. We are not hiring Liberace to work in our factory."

(h) Finally, in the case of an employee's injury, there is a job to go back to, which is in itself an element inducing speedy return to work and reducing attempts at malingering. The close relationship between employer and employee and among employees serves as a deterrent to fraud and collusion. All these elements are, of course, absent in the case of injury by a complete stranger.[28]

Lewis C. Ryan practices in Syracuse, New York. He is State Delegate from New York to the House of Delegates and served for two terms as President of the New York State Bar Association. For the past four years, he has been Chairman of the Committee on Casualty Insurance Law of the Section of Insurance Law.

Bruno H. Greene, Doctor of Laws (University of Vienna, Austria), a graduate of Rutgers University School of Law, formerly practicing member of the Austrian Bar, is now Assistant Professor of Law at Syracuse University College of Law. He is an honorary member of the Order of the Coif and a member of the New York State Bar Association.

The Scale of Awards . . . *A Compensation-Plan Mystery*

The "compensationists" assert that the main purpose of their plans is to assure an *adequate* indemnification of the victim. In fact, this postulate is the very *raison d'être* of their suggestions. But when a critic bluntly asks: "How much do you propose to pay for each type of injury?" the answer is as impatient as it is hazy, referring vaguely to workmen's compensation schedules or indefinite actuarial figures. However, we may, with some effort, distinguish two types of plans suggested:

(a) Awards should be based on the workmen's compensation schedules as now adopted by the various boards plus (it is reluctantly conceded) some adjustment upward because of the greater seriousness of automobile accidents, or

(b) The above award rates should apply to wage earners, while awards to non-earners, such as housewives, students, etc., should be founded on "assumed" weekly wage figures, and on a computation on the basis of "profits" for business and professional men.

If Plan (a) is seriously advocated, then the hand of Liberace, or the hand of a famous surgeon, will be worth exactly the same in terms of awards as the hand of a historian or that of a floor walker. This would then be the "adequate" compensation under such plans as proposed, for example, by Professor Ehrenzweig,[29] whose awards are based on the "minimum needs of low-income groups". If that were all the victims are entitled to, it is submitted that congestion in the New York Supreme Court, which is another strong argument relied on by the compensation-

27. Lilly, *supra*, note 26 at 806.

28. For another statement regarding the inapplicability of workmen's compensation principles to automobile accident compensation, see statement by the New York Superintendent of Insurance, Alfred J. Bohlinger, quoted in State of New York Department of Insurance, THE PROBLEM OF THE UNINSURED MOTORIST 51 (1951).

29. *Supra* note 1.

its, could be speedily relieved without any compensation plan because most insurance carriers of defendants now sued in automobile accident cases would be willing to settle claims, even of a less meritorious character, if they were confined to sums recoverable under workmen's compensation. However, plaintiffs advised by competent counsel will not, and should not, settle for amounts which will not, contrary to the apologists of compensation, adequately compensate them for their injuries. This is the protection of victims offered by our much-maligned present system of law.

The answer, offered by some compensation plan proponents, that, if the victim considers himself "worth more" than those minimum awards, he can take out accident insurance, is hardly satisfactory. By the same token we could dispense with all indemnification for accidents with or without the injurer's fault and rely entirely on the victim's accident insurance. The step toward insuring everybody against everything would be the logical sequel.

If, on the other hand, Plan (b) is put into operation, is there anyone who could honestly hazard a guess as to the feasibility of arriving at adequate and *"speedy"* awards by a compensation board which will have to determine a professional man's annual profits? Would not such a determination, even if accomplished, necessarily lead to litigation in the courts? Or should the parties be deprived of a resort to the courts under these circumstances? Is it possible even to imagine the cost, not only of the running of such a burdened administrative machine, but the cost to those motorists who are expected to subscribe to the compensation insurance? Can they seriously be expected to pay insurance rates which would enable the fund to disburse awards based on profits? Would not the fund become bankrupt even faster than the Saskatchewan compensation fund ran into a substantial deficit? There is no doubt, moreover, that without the control of an employer, without the vigilance of an opponent's attorney, invented or exaggerated claims, malingering and collusion would be rampant.

Administrative Adjudication . . *No Panacea for Our Problems*

Most of the proposed compensation plans are characterized by the feature of "exclusiveness", which means that compensation takes the place of any remedy by an action in tort. However, most proponents modified this feature by adding that, in the case of willful and wanton acts by the injurer or, as some others put it, in the case of criminal negligence, the victim would retain his right of action. On the other hand, plans following the Saskatchewan system advocate the retention of the common law action whenever the victim can prove ordinary negligence on the part of the injurer.

Is this the way to relieve crowded court calendars? Isn't it clear that, in order to obtain greater awards, claimants will allege willful or wanton conduct or criminal negligence so as to get to the jury or, where the plan permits action in case of ordinary negligence, claimants will allege such negligence for the same reason? In the latter case, of course, there will be a change, but one for the worse. Because, instead of crowding the courts only, claimants' actions will crowd both courts and administrative boards. But supposing no action was brought in the courts, would the administrative board dispose of the mass of compensation claims before it just by waving a magic wand? Wouldn't we be just transferring the evil from one tribunal to another? It is questionable whether the compilers of the "Columbia Plan" would have continued to believe in the efficiency and swiftness of action of a compensation board if they had known that, in the State of New York, for example, hearings before the Workmen's Compensation Board which numbered 379,686 in 1932 would mount to 576,171 in 1953. Truly, we would need a veritable giant of a compensation board for automobile accidents, with a full complement of law-trained personnel, adjusters, etc., to cope with what will necessarily be a tremendous number of claims. This is true especially if we keep in mind that, while now a large number of claims are settled before they reach the courts, *every* accident will result in a claim to the compensation board and will have to be processed by it. In addition, the problems arising out of compensation for automobile accidents would present far more complicated issues than those involving workmen's compensation, so that the number of hearings before the new board, necessitating interrogation of witnesses, doctors, business experts, etc., would doubtless by far exceed the number handled by workmen's compensation boards.

The Cure-all's Limits . . . *No Property Damage Award*

Virtually all proposed plans (with the exception of the Saskatchewan Plan) exclude specifically compensation for property damage. If we consider that property damage in motor vehicle accidents in 1954 amounted to the respectable figure of $1,600,000,000 (one billion six hundred million dollars!) and that in 3,450,000 accidents such property damage amounted to $25 or more,[30] we must wonder whether the compensation plans are not again falling short of their goal of clearing court calendars. Since there is property damage in all automobile accidents, except most of those involving injury to a pedestrian only, we shall see parallel actions before the compensation board and the courts. Moreover, we must keep in mind that the careful motorist will have to insure himself against property damage, which will add more millions of dollars to his insurance bill.

All compensation plans exclude awards for pain and suffering, since they are committed to fixed rates. If we agree that, as pointed out above, the principles of workmen's com-

(Continued on page 183)

30. *Supra* note 24 at pages 4, 43.

A Working Democracy:

The Association's House of Delegates

by John D. Randall · *Chairman of the House of Delegates*

■ John D. Randall, Chairman of the Association's House of Delegates, its policy-making body, here shows that every American lawyer is represented through the members of the House from his state or territory. Throughout its entire history, the representation of all American lawyers, including both members and non-members, has been a constant goal of the Association, which now for nineteen years has been an accomplished fact. This comprehensive representation of state and local bar associations is clear from the list of delegates beginning on page 123.

■ The American Bar Association is now composed of approximately 60,000 lawyers scattered throughout the world, wherever the American flag is flown. Our Association is now engaged in an all-out effort to secure 50,000 more lawyers throughout the same territory to join our Association.

If we feel that the present members of our Association are too few in number, we must remember that in 1936, the Treasurer of the Association in his annual report listed a membership of only 30,000.

While the growth of our Association may be attributed to a number of factors, to me probably the most influential reason for the growth in membership is the realization by every lawyer that in the House of Delegates of the American Bar Association he is represented.

Prior to the organization of the House of Delegates in 1936, no lawyer outside of the members of the American Bar Association had a voice in the policy-making of that Association. The Association was controlled by the action of the Assembly which, in turn, was composed of members of the American Bar Association who not only attended the Annual Meetings of our Association but also took the time to attend the Assembly meetings. It is doubtful whether the members who attended such Assembly meetings, except for a dedicated few, were aware of the problems confronting the Association or were representative of the lawyers within their particular state or locality or spoke for such lawyers. The situation is now entirely changed.

The House of Delegates is the policy-making body of the American Bar Association. Its membership is made up of representatives of the organized Bar, state and local, of the Assembly, as well as, *ex officio*, the President of the National Conference of Commissioners on Uniform State Laws, the Chairman of the National Conference of Bar Examiners, the Chairman of the National Conference of Judicial Councils, the President of the Association of American Law Schools and the President of the National Association of Attorneys General. In addition, the American Law Institute and the American Judicature Society have delegates in the House of Delegates.

National legal organizations, 25 per cent of whose members are members of the Association, after being approved by the House of Delegates, have representatives as members of the House.

Members of the Board of Governors and the officers of the Association are also members of the House of Delegates. In addition, the Attorney General, the Director of the Administrative Office of the United States Courts, the Solicitor General of the United States—as well as the Deputy Attorney General—are members of the House of Delegates. There are also delegates representing each of the seventeen Sections. Section Chairmen and Committee Chairmen are entitled to the floor of the House when presenting Section and Committee reports and are given a seat in the House, but they have no vote. The past Presidents and past Chairmen of the House are entitled to membership in the House when they register at the Annual Meetings of the Association.

The details of the membership in the House of Delegates are of interest because they demonstrate the

fact that in the deliberations of the House of Delegates the members have available the opinion of lawyers who have made special study of various phases of the law in connection with their work in particular Sections and on particular committees. Therefore, the deliberations of the House of Delegates are enlightened by informed men.

The largest single unit in the membership of the House is made up of bar association delegates who are selected by state and local bar groups throughout the nation. Each recognized state bar association is entitled to one representative in the House. The basic membership is for 2,000 members in such state bar associations. Then each additional 1,000 members over the basic 2,000 members entitles the state bar association to additional representation with a maximum of four delegates. Local bar groups having a membership of eight hundred or more, 25 per cent of whom are members of the American Bar Association, are entitled to a delegate. Representation of a local bar association, however, does not increase the maximum of four delegates to which the state's bar associations are entitled.

The group of fifty-two state delegates represents the members of the American Bar Association in each state and includes delegates from Alaska, the District of Columbia, Puerto Rico and Hawaii.

The delegates of state and local bar associations are selected by those associations and thus represent lawyers who may not be members of the American Bar Association. To that extent the House of Delegates is the voice of all the lawyers of the United States.

The members of the House attend the Annual Meeting at their own expense and receive mileage and traveling expenses only for the Mid-year Meeting. Notwithstanding the expense, over 90 per cent of the members of the House are in attendance and take part in the deliberations of the House at its various meetings.

I feel that it can truly be said that the membership of the House is made up of the leaders of the Bar who have a deep sense of public service as well as a keen appreciation of their duty to their profession and of their responsibilities as the representatives of their constituents.

Every member of the House of Delegates is expected to participate in its debates and is expected to vote. Any restriction in the time for debate is for the purpose of securing a broader knowledge through the expression of the views of more of the members of the House. Thus the viewpoint of the House of Delegates is an educated viewpoint. The particular problem is considered from a technical legal standpoint as well as from the broader standpoint of the individual delegates from each section of our country and its territories.

Considering the democratic nature of the House of Delegates and the fact that its members are truly representative as well as the fact that the group is composed of trained individuals who are accustomed to assembling facts for the purpose of persuasion and who are advocates in the best sense of the word, it is easily understood why the views of the American Bar Association are sought by the executive as well as by the legislative organs of our government.

The list of the bar association delegates which follows best illustrates the broad coverage of the House of Delegates. With increased membership and enthusiasm, we will become increasingly effective in every respect.

John W. Barry

John D. Randall
Chairman, House of Delegates

Bar Association Delegates in House of Delegates

Alabama State Bar	Francis H. Inge, Mobile
Alaska Bar Association	John E. Manders, Anchorage
State Bar of Arizona	Ivan Robinette, Phoenix
Arkansas Bar Association	Herschel H. Friday, Jr., Little Rock
State Bar of California	Howard J. Finn, San Francisco
	Roy A. Bronson, San Francisco
Bar Association of San Francisco	R. E. H. Julien, San Francisco
Los Angeles Bar Association	Augustus F. Mack, Jr., Los Angeles
The Colorado Bar Association	Harry S. Petersen, Pueblo
Denver Bar Association	Kenneth M. Wormwood, Denver
State Bar Association of Connecticut	Charles M. Lyman, New Haven
Delaware State Bar Association	Alexander L. Nichols, Wilmington
Bar Association of the District of Columbia	Lowry N. Coe, Washington, D.C.
" " "	Francis W. Hill, Jr., Washington, D.C.
" " "	H. Cecil Kilpatrick, Washington, D.C.
" " "	Godfrey L. Munter, Washington, D.C.
The Florida Bar	James D. Bruton, Jr., Plant City
" " "	Donald K. Carroll, Jacksonville
" " "	Darrey A. Davis, Miami Beach
Georgia Bar Association	J. Lance Lazonby, Gainesville
" " "	C. Baxter Jones, Sr., Macon
Bar Association of Hawaii	William B. Stephenson, Honolulu
Idaho State Bar Association	Willis E. Sullivan, Boise
Illinois State Bar Association	Thomas S. Edmonds, Chicago
" " " "	Albert E. Jenner, Jr., Chicago
" " " "	Karl C. Williams, Rockford
The Chicago Bar Association	Ferris E. Hurd, Chicago

The Indiana State Bar Association	William S. Isham, Fowler
" " "	Thomas M. Scanlon, Indianapolis
The Iowa State Bar Association	Clyde E. Jones, Ottumwa
" " " " "	Henry J. TePaske, Orange City
The Bar Association of the State of Kansas	George B. Powers, Wichita
Kentucky Bar Association	Marion W. Moore, Covington
" " "	Ben W. Fowler, Frankfort
Louisiana State Bar Association	George T. Madison, Bastrop
" " " "	Ben R. Miller, Baton Rouge
Maine State Bar Association	John J. Mahon, Lewiston
The Bar Association of Baltimore City	Walter V. Harrison, Baltimore
Maryland State Bar Association	Reuben Oppenheimer, Baltimore
" " " "	Stedman Prescott, Rockville
Massachusetts Bar Association	Robert W. Bodfish, Springfield
" " "	Frank W. Grinnell, Boston
" " "	Joseph Schneider, Boston
State Bar of Michigan	Fred Roland Allaben, Grand Rapids
" " " "	William T. Gossett, Dearborn
" " " "	Richard H. Paulson, Kalamazoo
Detroit Bar Association	William B. Cudlip, Detroit
Minnesota State Bar Association	Sidney P. Gislason, New Ulm
" " " "	John M. Palmer, Minneapolis
Mississippi State Bar	Phil Stone, Oxford
The Missouri Bar	Lynn M. Ewing, Nevada, Missouri
" " "	Charles E. Whittaker, Kansas City
The Bar Association of St. Louis	Fred J. Hoffmeister, St. Louis
Kansas City Bar Association	Spurgeon L. Smithson, Kansas City
Montana Bar Association	James T. Finlen, Butte
Nebraska State Bar Association	Clarence A. Davis, Lincoln
" " " "	Laurens Williams, Omaha
State Bar of Nevada	William K. Woodburn, Reno
Bar Association of the State of New Hampshire	Willoughy A. Colby, Concord
New Jersey State Bar Association	Robert K. Bell, Ocean City
" "	James D. Carpenter, Jr., Jersey City
" "	John H. Yauch, Jr., Newark
Essex County Bar Association	Arthur J. Connelly, Newark
State Bar of New Mexico	Lorna M. Shipley, Alamogordo
New York State Bar Association	Arthur VD. Chamberlain, Rochester
" "	Cloyd Laporte, New York
" "	
New York County Lawyers' Association	Edwin M. Otterbourg, New York
The Association of the Bar of the City of New York	Whitney North Seymour, New York
The North Carolina State Bar	Edward L. Cannon, Raleigh
State Bar Association of North Dakota	Vernon M. Johnson, Wahpeton
The Cleveland Bar Association	J. Virgil Cory, Cleveland
Columbus Bar Association	Earl F. Morris, Columbus
Cincinnati Bar Association	William H. Nieman, Cincinnati
Ohio State Bar Association	Benjamin C. Boer, Cleveland
Oklahoma Bar Association	Charles B. Duffy, Ponca City
" " "	G. Ellis Gable, Tulsa
" " "	Floyd L. Rheam, Tulsa
Multnomah Bar Association	Hugh L. Biggs, Portland, Oregon
Oregon State Bar	William H. Morrison, Portland
The Allegheny County Bar Association	J. Vincent Burke, Jr., Pittsburgh
Pennsylvania Bar Association	Paul A. Mueller, Lancaster
" " "	A. Carson Simpson, Philadelphia
Philadelphia Bar Association	C. Brewster Rhoads, Philadelphia
Puerto Rican Bar Association	A. Cecil Snyder, San Juan
The Rhode Island Bar Association	Colin MacR. Makepeace, Providence
South Carolina Bar Association	Frank B. Gary, Columbia
The State Bar of South Dakota	Dwight Campbell, Aberdeen
The Bar Association of Tennessee	John C. Goins, Chattanooga
" "	Lon P. MacFarland, Columbia
State Bar of Texas	Cecil E. Burney, Corpus Christi
" " " "	R. A. Kilpatrick, Cleburne
" " " "	J. Glenn Turner, Dallas
Dallas Bar Association	J. Cleo Thompson, Dallas
Utah State Bar	Leland M. Cummings, Salt Lake City
Vermont Bar Association	J. Boone Wilson, Burlington
Virginia State Bar Association	Stuart B. Campbell, Wytheville
Virginia State Bar	Thomas H. Willcox, Norfolk
Washington State Bar Association	Joseph H. Gordon, Tacoma
Seattle Bar Association	Tracy E. Griffin, Seattle
The West Virginia State Bar	Thomas B. Jackson, Charleston
Wisconsin Bar Association	George S. Geffs, Janesville
" " "	E. H. Hallows, Milwaukee
Milwaukee Bar Association	Harold F. Lichtsinn, Milwaukee
Wyoming State Bar	Edward E. Murane, Casper

Section Delegates to the House of Delegates

Administrative Law—Ashley Sellers, Washington, D. C.
Antitrust Law—Herbert A. Bergson, Washington, D. C.
Bar Activities—Harry Gershenson, St. Louis, Missouri
Corporation, Banking and Business Law—Ray Garrett, Chicago, Illinois
Criminal Law—Arthur J. Freund, St. Louis, Missouri
Insurance Law—George E. Beechwood, Philadelphia, Pennsylvania
International and Comparative Law—Arthur H. Dean, New York, New York
Judicial Administration—Arthur F. Lederle, Detroit, Michigan
Junior Bar Conference—Stanley B. Balbach, Urbana, Illinois
Labor Relations Law—Herbert S. Thatcher, Washington, D. C.
Legal Education and Admissions to the Bar—John M. Allison, Tampa, Florida
Mineral Law—Marshall Newcomb, Dallas, Texas
Municipal Law—Harold S. Shefelman, Seattle, Washington
Patent, Trademark and Copyright Law—John Dashiell Myers, Philadelphia
Public Utility Law—Jonathan C. Gibson, Chicago, Illinois
Real Property, Probate and Trust Law—Rush H. Limbaugh, Cape Girardeau, Mo.
Taxation—Thomas N. Tarleau, New York, New York

Assembly Delegates

Martin J. Dinkelspiel, San Francisco, California
Richard H. Bowerman, New Haven, Connecticut
Charles H. Burton, Washington, D. C.
Richard Bentley, Chicago, Illinois
Paul W. Lashly, St. Louis, Missouri
Ross L. Malone, Roswell, New Mexico
Julius Applebaum, New York, New York
James D. Fellers, Oklahoma City, Oklahoma
Walter P. Armstrong, Jr., Memphis, Tennessee
Walter Chandler, Memphis, Tennessee
Hatton W. Sumners, Dallas, Texas
David Nelson Sutton, West Point, Virginia
Alfred J. Schweppe, Seattle, Washington
C. Baxter Jones, Jr., Atlanta, Georgia
George E. Brand, Detroit, Michigan

State Delegates

Alabama, William Logan Martin, Birmingham,
Alaska, R. E. Robertson, Juneau,
Arizona, Walter E. Craig, Phoenix,
Arkansas, Edward L. Wright, Little Rock,
California, Archibald M. Mull, Jr., Sacramento,
Colorado, Edward G. Knowles, Denver,
Connecticut, Charles W. Pettengill, Greenwich,
Delaware, William Poole, Wilmington,

D. C., Charles S. Rhyne, Washington,
Florida, E. Dixie Beggs, Pensacola,
Georgia, William B. Spann, Jr., Atlanta
Hawaii, J. Garner Anthony, Honolulu,
Idaho, E. B. Smith, Boise,
Illinois, Benjamin Wham, Chicago,
Indiana, Telford B. Orbison, New Albany,
Iowa, Ingalls Swisher, Iowa City,
Kansas, W. D. P. Cary, Hutchinson,
Kentucky, Edward A. Dodd, Louisville,
Louisiana, Cuthbert S. Baldwin, New Orleans,
Maine, Clement F. Robinson, Brunswick,
Maryland, R. Carleton Sharretts, Jr., Baltimore,
Massachusetts, Allan H. W. Higgins, Boston,
Michigan, Glenn M. Coulter, Detroit
Minnesota, William W. Gibson, Minneapolis,
Mississippi, John C. Satterfield, Jackson,
Missouri, Robert L. Hecker, Kansas City,
Montana, Julius J. Wuerthner, Great Falls,
Nebraska, George H. Turner, Lincoln,
Nevada, John Shaw Field, Reno
New Hampshire, Louis E. Wyman, Manchester
New Jersey, Sylvester C. Smith, Jr., Newark,
New Mexico, Floyd W. Beutler, Taos,
New York, Lewis C. Ryan, Syracuse,
North Carolina, Egbert L. Haywood, Durham,
North Dakota, Herbert G. Nilles, Fargo,
Ohio, Philip C. Ebeling, Dayton,
Oklahoma, Howard T. Tumilty, Oklahoma City,
Oregon, Glenn R. Jack, Oregon City,
Pennsylvania, Vincent P. McDevitt, Philadelphia,
Puerto Rico, Francisco Ponsa-Feliu, San Juan,
Rhode Island, Henry C. Hart, Providence,
South Carolina, Walton J. McLeod, Jr., Walterboro,
South Dakota, Roy E. Willy, Sioux Falls,
Tennessee, Charles G. Morgan, Memphis,
Texas, James L. Shepherd, Jr., Houston,
Utah, Franklin Riter, Salt Lake City,
Vermont, Osmer C. Fitts, Brattleboro,
Virginia, Stuart T. Saunders, Roanoke,
Washington, Richard S. Munter, Spokane,
West Virginia, Frank C. Haymond, Charleston,
Wisconsin, Gerald P. Hayes, Milwaukee,
Wyoming, H. Glenn Kinsley, Sheridan,

Organizations Represented in the House of Delegates

American Judicature Society	Albert J. Harno, Urbana, Illinois
The American Law Institute	Harrison Tweed, New York, New York
American Patent Law Association	Albert R. Teare, Cleveland, Ohio
Association of American Law Schools	Maurice T. Van Hecke, Chapel Hill, North Carolina
The Association of Life Insurance Counsel	John Barker, Jr., Boston, Massachusetts
Conference of Chief Justices	William H. Duckworth, Atlanta, Georgia
The Federal Bar Association	Stanley N. Barnes, Washington, D. C.
Federal Communications Bar Association	Percy H. Russell, Jr., Washington, D. C.
Judge Advocates Association	Joseph F. O'Connell, Jr., Boston, Massachusetts
The Maritime Law Association of the United States	Charles S. Haight, New York, New York
The National Association of Attorneys General	John Ben Shepperd, Austin, Texas
National Association of Women Lawyers	Dorothea Blender, Chicago, Illinois
The National Conference of Bar Examiners	Len Young Smith, Chicago, Illinois
National Conference of Commissioners on Uniform State Laws	Barton H. Kuhns, Omaha, Nebraska
National Conference of Judicial Councils	Frederick W. Brune, Baltimore, Maryland

Colonel William Winthrop:

The Tradition of the Military Lawyer

by George S. Prugh, Jr. · *Major, Judge Advocate General's Corps, United States Army*

■ **The classic work on American military law—a field that three recent conflicts have made perhaps more familiar than we should like—is William Winthrop's Military Law and Precedents, first published in 1866. Few people, however, know anything about the author, whose long, useful Army career was brilliant and, from his point of view, bitterly disappointing. Colonel Winthrop was one of our first military lawyers. Major Prugh's sketch of his life demonstrates that he was a credit to both of the old, honorable professions to which he belonged.**

■ When it comes to writing, lawyers are on the whole distinctly unbashful. Let a youngster try a few cases and he is ready to reveal to the public the latest tricks of the trade in trial techniques. Put a little gray about his temples and he acquires an almost irrepressible urge to record for posterity the memoirs and anecdotes of his practice. Should he be among the seeming multitudes of "specialists" it is almost certain that he will try his hand at a textbook—in three or more volumes, if possible.

Each succeeding generation produces its full share of lawyer-writers, and it is rare indeed that a field of law escapes an occasional, if not regular, literary overhaul. Military law and military lawyers differ little in these respects from their counterparts out of uniform, and from General Washington's Continental Army of old to General Dahlquist's Continental Army Command of today, military law has had its full share of commentators.

The value of the efforts of these writers has run the entire scale but there is one work almost unanimously recognized by civilian students of military law, by professional scholars and by judge advocates, whether patriarchs of pre-World War I or neophytes of post-Korea, as the greatest single contribution to military legal thought ever to appear on the American scene. This worthy companion of, say, *Littleton on Tenures* or *Cooley on Torts,* standing substantially unchallenged for seventy years, is, of course, *Military Law and Precedents* by William Woolsey Winthrop.

Oddly enough, fate usually contrives to bury the law writer himself in obscurity. While his work may stand as a monument for decades, the lawyers who read and use the inscriptions thereon seldom know much about the man who created the worshipped edifice. William Winthrop may take his place in these ranks of relatively unknown scholars making lasting contributions to their professions.

In the following paragraphs, then, let us try to dust the record and turn a few of its pages to see what we may of the life and times of this foremost American scholar of military law.

Like a Wagnerian opera, Winthrop's life seems to have running through it several constant themes—themes that bind and limit him from his birth in New Haven, Connecticut, on August 3, 1831, until his death nearly sixty-eight years later. The first of these themes describes him as a man taking part in the great American transition, from the minor key of the struggling nation just before the Civil War to the hopeful crescendo closing the Spanish-American War and opening the new century. Flushed with the sudden realization of its importance, its flexing muscles giving notice to all the world of its great new powers, the United States by 1899, when Winthrop died, had just completed a half century of the most amazing progress known to the history of the world. Insignificantly, unaware that he, too, had a part in the making of that progress, Winthrop had moved along with the score until the twentieth century was just in sight.

The second theme is a steady one—it recounts the story of the loyal public servant; the devoted, nose-to-the-grindstone, day-to-day plugger, who bows to the routine of his profession, but never loses sight of his larger purpose.

The third theme is the tragic one—Winthrop's fate always to be the "also-ran", forever the "Indian" and

never the "chief".

Before he had reached his twentieth birthday, Winthrop had obtained his A.B. degree at Yale. Also at Yale, two years later, in 1853, he was awarded his LL.B., after which he spent one year at Harvard in graduate work. Very little is known of his activities from that time until the start of the Civil War, but it is known that he entered private law practice in Boston in 1855 with William J. Hubbard, sometime later moved on to practice at a wide spot in the road known then as St. Anthony, Minnesota (now called Minneapolis), and by 1860 was in New York City, practicing with Yale classmate Robbins Little.[1]

On April 13, 1861, Fort Sumter fell and two days later President Lincoln issued his famous call for 75,000 volunteers. On April 17, William Winthrop and his brother Ted, older than William by three years, had enrolled as privates in Company F of New York's proud 7th Regiment, and by the nineteenth they were marching to Washington.

Ted, it seems, was one of those personalities that appear like a comet—suddenly rising, bursting with a great flash, and then just as suddenly disappearing—but leaving behind him bits of glittering stardust which serve to give him a lasting fame. Ted, too, had been admitted to the Bar, but had been absorbed more in traveling and writing than he had been in the career of law. Today it is difficult to find a reference to William Winthrop in any encyclopedia, but Ted's name is often found, especially in various literary "Who's Who" where mention is made of his six posthumously published novels. (The familiarity in using the nickname "Ted" stems from the warmth of his writing, but the ponderous dignity of William's *Military Law and Precedents* discourages the use of "Bill".)

Ted seized upon this march from New York to Washington as a great adventure story, and his description of "Our March to Washington", published in the *Oxford Book of American Essays*, has frequently been drawn upon as an accurate and colorful account of the exciting early days of the great war. Ted's lines about life along the Potomac in that April of '61 will bring a grin to the face of many present-day soldiers who have served "occupation duty" at the old Munitions Building or the Pentagon.

In some mysterious way, Brigadier General Ben F. Butler, himself a lawyer and later to become famous, or infamous, as "Beast" Butler in command of the Union troops occupying New Orleans, selected Private Ted from the New York 7th to accompany him as his aide, with the rank of major, to Fortress Monroe, the Union-held bastion at Hampton Roads, Virginia. Ted was not there long. During one of the first Union offensives of the war, on June 10, 1861, he was killed while leading an assault upon Confederate lines at Big Bethel Church, thirteen miles below Yorktown and eight miles from Hampton. Douglas Southall Freeman notes of this action merely that Lieutenant Colonel Daniel Harvey Hill, C.S.A., met and repulsed some poorly handled assaults by Federals who already had sustained casualties by firing wildly into one another. The South lost eleven men, the North lost seventy-six.

Just one week before Ted's death, however, William Winthrop's short-term enlistment had expired and he was mustered out of the service in New York City. W. Templeton Johnson, an old friend of the Winthrop family, later wrote to Senator Charles Sumner that William had then been offered his brother's command, but that he had declined it out of feeling for his mother. Whatever may have happened at that time, the records do show that by the first of October, 1861, William Winthrop was a First Lieutenant in Company H, 1st United States Sharpshooters, a unit he had helped to create.

In September, 1862, just before Winthrop was promoted to captain for gallantry in the field, an important event, destined to influence greatly the career of this young soldier-lawyer, had occurred: the "Judge Advocate of the Army", Brevet Major John F. Lee, stepped down after thirteen years on the job and Joseph Holt, formerly Commissioner of Patents, Postmaster General, and Secretary of War under President Buchanan, was appointed the fourth Judge Advocate General in the Army's history and the first since the Revolution. Colonel Holt applied himself most energetically to his tasks and in March of 1863, when Congress authorized President Lincoln to suspend the writ of habeas corpus, Colonel Holt's views on the military commission as a tribunal for the trial of military and civilian alike were readily adopted. Congress had also authorized the appointment of judge advocates, and Colonel Holt set about gathering as fine a collection of legal talent as the Corps has known. From this group of thirty-three officers were to come five Judge Advocates General of the Army, a Judge Advocate General of the Navy, at least two Congressmen, a reporter for the Supreme Court, several famous practitioners, and the revered John Chipman Gray, professor of law at Harvard and recognized authority on the law of real property. The records do not show how it came about that sometime in 1863 William Winthrop was detailed as one of the thirty-three judge advocates, but he reported for duty in Washington at that time as the Judge Advocate for the Department of the Susquehanna.

As one of his initial assignments, Winthrop was the "action officer" on a piece of proposed legislation designed to create a Bureau of Military Justice to be headed by a brigadier general as the Judge Advocate General, with two colonels as assistants. Apparently one of the colonel vacancies was to go to Winthrop when the bill passed, but, alas, when Congress finally got around to approving the establishment of the Bureau, the number of assistants had been trimmed to one—and that one did not go to Winthrop. As a sort of consolation, however, all of the other

1. 1 J.A.G. Jour. 12 (December 1945), *William Woolsey Winthrop* by Major William F. Fratcher, J.A.G.C.

judge advocates were authorized the grade of major so that the records show Winthrop accepting a commission as Major, Judge Advocate, Volunteers, on September 24, 1864, less than two months before Sherman started his famous resistance-shattering march from Atlanta to the sea.

In October, 1864, a civilian by the name of Milligan was tried by military commission in Indiana. Although Winthrop is not shown to have worked directly on this case, no one who reads Winthrop's *Military Law and Precedents* can doubt that he was profoundly influenced by this case and the whole military commission concept. In any event, when Milligan finally was able to get his case before the United States Supreme Court[2] in 1866, the public had a grand opportunity to hear the arguments of the distinguished counsel (these included James A. Garfield, Ben F. Butler and David Dudley Field whose brother, Associate Justice Stephen J. Field sat on the bench) and to form its opinion about the practices of the war-time military commissions. Judge Advocate General Holt, by then a brigadier general, was later roundly criticized in the press for his stand on the commissions, not so much for the *Milligan* case as for the case of Mary Surratt and the Lincoln assassination conspirators who were tried in 1865 with such surprising alacrity.

A Brevet Colonel . . . *Serving as a Major*

For his faithful and meritorious service in the field and to his Department, Winthrop was given two brevet promotions on the same date, March 13, 1865, shortly before Lee's surrender at Appomattox. The end of the war found Winthrop a Brevet Colonel of Volunteers but still serving in Washington as a Major, Judge Advocate.

The years immediately following the Civil War were years of stress and strain for the Army. In 1866, about the time Ted Winthrop's book, *Life on the Open Road,* was being published, Congress was busy establishing the Freedman's Bureau, passing the new Civil Rights Acts, making the Fourteenth Amendment to the Constitution, and trying to put the Indians on reservations. In the South, the Ku Klux Klan headed by Nathan Bedford Forrest commenced its operations, and federal troops were meeting with great difficulty in enforcing the new laws in many Southern communities. Through this period the official records tell little of Major Winthrop. In February of 1867, he was permitted to drop from the Army register his middle name, Woolsey, the maiden name of his mother, and never thereafter is he shown to have used it. His duty was in the Military Justice Bureau in Washington. The War Department in those days was housed principally in two buildings, one adjoining the White House on Pennsylvania Avenue where the Old State Building now stands, the other across from it on 17th Street. Although demobilizing the Grand Army of the Republic was in itself a tremendous task, Congress at the same time set about creating five military districts in the South, all under martial law. This was done via the first Reconstruction Acts. Military commissions, active enough with about 2000 cases during the war, were now used extensively throughout the South. "Judge" Holt's commissions constituted probably the largest and most active single judicial system in the country and the decisions then rendered profoundly affected our views of military government, even during the recent occupations of Germany and Japan.

President Andrew Johnson was having his hands full of trouble in 1867. In August he attempted to oust Stanton as Secretary of War and to replace him with General Grant. Congress had virtually deprived the President of command of the Army by requiring him to issue all orders through the General and Johnson's action was designed to test the constitutionality of that law. Instead it directly brought about the impeachment effort. In the midst of this turbulence, the Bureau of Military Justice sought to introduce a new

George S. Prugh, Jr., received his A.B. degree from the University of California at Berkeley in 1941 and his LL.B. degree at Hastings College of Law in 1948. Since then, he has been an officer in the Judge Advocate General's Corps with tours of duty in San Francisco, in Washington, D.C., and in Germany. He is a member of the California Bar.

set of articles of war to replace those that had been enacted in 1806 and used throughout the Civil War. Major Winthrop, recently integrated into the Regular Army (February 25, 1867), had been at least one of the "action officers" in revising the articles. It seems characteristic of American military justice that after each major war a "reform" is undertaken. Our history shows very few instances of overhaul before a fight has started. In any case, Congress apparently had bigger things on its mind at the time the new articles were presented, and it wasn't until 1874 that they were finally enacted into law.

No sooner had President Johnson finally cleared the impeachment hurdles in 1868 than the country faced the presidential election campaign that was to place Ulysses S. Grant, late Chief of Staff of the Army, in the White House. The Supreme Court was wrestling with the famous cases of *Ex parte McCardle,*[3] *Texas* v. *White,*[4] *Ex parte Garland*[5] and *Cummings* v. *Missouri*[6], the lat-

2. 4 Wall. (71 U.S.) 2, 18 L. ed. 281 (1866).
3. 7 Wall. (74 U.S.) 506, 19 L. ed. 264 (1869).
4. 7 Wall. (74 U.S.) 700, 19 L. ed. 227 (1869).
5. 4 Wall. (71 U.S.) 333, 18 L. ed. 366 (1867).
6. 4 Wall. (71 U.S.) 277, 18 L. ed. 356 (1867).

er two condemning the loyalty oaths which had been required of former Confederates.

In 1873, the startling victory of Bismarck in the Franco-Prussian War having recently focused some attention on European affairs, Winthrop completed and published a translation of the Military Penal Code for the German Empire. In that same year, as an indication that the Bureau of Military Justice was extremely active, two military prisons were created—Leavenworth and Alcatraz—and the Judge Advocate General was charged with supervision of these installations. And in California, the Modoc Indians, led by "Captain" Jack, murdered General Canby, an experienced Civil War general, and generally badgered the federal troops.

Work was commenced by Winthrop on his *Military Law* in 1875, the same year that saw William McKee Dunn, former Congressman from Indiana, relieve Brigadier General Holt as Judge Advocate General. Dunn had been Assistant Judge Advocate General since 1864 and well learned of the value of Winthrop, for it is significant that he was able to remain in Washington, now his adopted home, until after General Dunn retired in 1881.

In early 1876, President Grant's Secretary of War of seven years, W. W. Belknap, faced impeachment proceedings arising out of allegations of graft in connection with the Indian Service. In view of his resignation, his subsequent acquittal of the impeachment was a hollow victory. Other events were stirring the nation: Custer met Sitting Bull at the Little Big Horn, Rutherford B. Hayes won a close presidential election over Samuel Tilden, and Alexander Bell demonstrated in Washington his new telephone device. Major Winthrop had not been idle during this period either, for the following year he was married to Miss Alice Worthington, of Washington. He was 46 at the time, had been a Major for twelve years and a continual resident of the District of Columbia and the War Department offices for fourteen years.

The yellowing, crackling records of the National Archives contain several papers submitted by Major Winthrop during the next three years in an attempt to correct the status of his brevet rank. It seems that his brevet had been in the U.S. Volunteers, and he believed that since he had been integrated the brevet should be changed from Volunteer to Regular status. His persistence in fighting his cause up to the Attorney General was not rewarded, however, for in January and February of 1881, two opinions by that official rebuffed Winthrop's efforts[7]. It was also during this period that Winthrop's first major collection of military laws was published, the *Digest of Opinions of the Judge Advocate General, 1880.*

Judge Advocate General Dunn retired from his office and from the Army on January 22, 1881, and on February 2 Major Winthrop was appointed Acting Judge Advocate General of the Army by President Hayes. Winthrop surely was not aware that this was to be the closest he would ever get to the summit of his professional career! Sixteen days later D. G. Swaim, five years junior in service to Winthrop, was appointed the Judge Advocate General and raised in rank from Major to Brigadier General by his fellow-Ohioan, President Hayes, himself a former major general. In early March, the newly-elected President, James A. Garfield, also of Ohio and a former major general, took office only to be mortally wounded less than four months later by an assassin while in the Old Pennsylvania Station, then on 6th Street and the Mall, in the neighborhood of what is now the Smithsonian Institution. Vice President Chester A. Arthur became the new Commander-in-Chief.

With the advent of General Swaim, Major Winthrop's long tour of duty in Washington had its end in sight. In the spring of 1882, orders were issued assigning him to the Department of the Pacific, with headquarters at the Presidio in San Francisco, California. Alice Winthrop had become ill, however, and her inability to make the long arduous trip across the continent served to put off Winthrop's actual departure for the coast until October, 1882 (almost twenty years after the start of his duty in Washington. Surely that must be one of the longest tours of duty in one place by any judge advocate!).

To the Presidio . . .
An Unhappy Change of Station

The transfer was not a happy one from Winthrop's point of view. He was deep into his book by this time, and he felt the need to be in Washington where the records and archives were available to him. Instead he was in one of the most isolated posts the Army then had. The law library in the Army headquarters at the Presidio was so insubstantial that the annual report of the Judge Advocate General for 1883 contains a specific request from Winthrop that he be authorized $100 "for the purchase of a share in the public law library of San Francisco known as the San Francisco Law Library Association" in order to be permitted the use of its facilities. Winthrop had not delayed in being admitted to the California Bar, his admission being on motion before the State Supreme Court on January 9, 1883. In the summer of that year he appeared as counsel before the U.S. Circuit Court, District of California, on behalf of the United States in the case of *In re White.*[8] Justice Stephen Field and Judge Sawyer heard this case, involving a petition for a writ of habeas corpus by a person who was being held by the military authorities for trial by court martial for desertion. Winthrop won his case.

General John M. Schofield, a Civil War general who had served with Sherman on his march to the sea and who had been Secretary of War for a short time under Andrew Johnson, requested that Winthrop be transferred to his command, the Department of Missouri, with headquarters in Chicago, Illinois, but Sherman,

(Continued on page 188)

7. 17 Op. Atty. Gen. 3; 17 Op. Atty. Gen. 46.
8. 9 Sawy. 49, 17 Fed. 723 (1883, C.C. Calif.).

The American Bar Association:

A Summary of Its Financial Affairs

by Harold H. Bredell • *Treasurer of the American Bar Association*

■ **Here is a brief resume of the manner in which the financial affairs of the Association are conducted, how it obtains its income and how its funds are used.**

■ Our experience has indicated that the financial affairs of the American Bar Association are probably little understood, even by many members of the Association. It is therefore particularly fitting that some information on this subject should be given in this issue of the JOURNAL which is being sent to many nonmember lawyers, as well as to the members of the Association, as part of the membership campaign. It is understandable that prospective members should want to know something of the organization they are joining.

How the Association's Affairs Are Conducted

Financial controls are exercised primarily by the Board of Governors and its sub-committees: Administration Committee (consisting of the four elected officers and the last retiring President) which has responsibility for Headquarters operations; and the Budget Committee which prepares the budget, which is established for each fiscal year for the operations of the Association and its many Committees and Sections. Chairmen of Committees and Sections are charged with the responsibility of keeping expenditures within budgetary limits. Expenditures are made only upon prior approval by the officer or chairman in charge of the project involved, with review by the Controller at Headquarters office and final approval by the Treasurer, who is the elected officer having general responsibility for financial matters.

It should be remembered that this is a voluntary association with elected officers who serve without compensation, and who contribute their time and personal funds to the welfare of the Association. With such officers residing in different cities of the country, it is essential that the now substantial operations of the Association must be carried out by a full-time employed staff (about eighty in number), under the direction of the Executive Director and of the heads of various departments. These operations are housed principally at the American Bar Center in Chicago, under lease from the American Bar Foundation which is the corporation holding title to the land and whose building has been erected by the voluntary contributions of the lawyers of the country and their friends.

How the Association Obtains Its Income

For its financial support, the Association must rely in greatest measure upon the dues paid by its members. At the present time the regular dues are $16.00 for those members admitted to the Bar more than five years, $8.00 for those members admitted to the Bar more than two years and less than five years, and $4.00 for those admitted to the Bar within two years. Sustaining membership dues of $25.00 and patron membership dues ranging from $50.00 to $250.00 are for those members who desire to contribute more than the regular membership dues. In addition to the dues paid to the Association generally, those who are interested in the various Sections pay separate dues to advance the fields of law in which they have a special interest.

For the fiscal year ended June 30, 1955, general dues amounted to $735,447.38, and Section dues were $115,110.50. The only other income of the Association (other than grants or contributions for special purposes) consisted of $56,423.13 received by the AMERICAN BAR ASSOCIATION JOURNAL for advertising and other income; and investment income of $16,368.42.

Out of the dues of each member the sum of $2.50 is allocated directly to the AMERICAN BAR ASSOCIATION JOURNAL as the subscription price. The actual cost of furnishing the JOURNAL for one year to each member is $3.07.

Harold H. Bredell
Treasurer, American Bar Association

After taking out of the general income the allocation to the JOURNAL and the income earmarked for special accounts, the amount remaining to finance the general work of the Association was $615,901.65 in the last fiscal year.

How the Association's Funds Are Used

The activities of the Association are carried on through approximately sixty Committees and Sections, in service to the public, service to the profession generally, and service to the members of the Association and its Sections. It is obvious that no "hard and fast" allocation can be made as to purpose because so many activities benefit both the profession and the public generally. However, in the present year's budget (July 1, 1955 to June 30, 1956) an effort has been made to allocate the expenditures on a program or project basis.

The following statements are therefore intended to indicate to the reader the nature of the project allocations anticipated for this year. Obviously this is not intended as any detailed accounting, because of the limitations of space.

(1) *General Administration*: To keep the Association functioning and to provide servicing for the voluntary activities of members throughout the country, it is, of course, necessary to have a headquarters office. The budget indicates an estimated cost for the current fiscal year of approximately $50,000 for the maintenance of the physical plant of the American Bar Center and $150,000 for the general administration.

(2) *Publications*: The principal medium of the Association is the AMERICAN BAR ASSOCIATION JOURNAL sent to all members monthly. Many other publications are published by the Association in its effort to serve both the Bar and the public in the dissemination of information. The cost of publications last year was approximately $220,000.

(3) *Service to Education*: For many years the Association has fostered the improvement of legal education and it can be proud of its accomplishments in this field. It gives financial support to the inspection of law schools to maintain minimum standards. The Association has a continuing interest in law students and it has sponsored and is continuing its financial support of the American Law Student Association. In this service to legal education it is expending approximately $35,000 each year.

(4) *Service to the Public*: This is not the place to detail the many services of the Association in the public interest to which funds of the Association are devoted except to mention a few as illustrations: traffic court program, uniform laws, judicial administration, American citizenship, legal aid, lawyer referral, federal tax reforms, and many others of similar character. For the programs of this character, the present budget is approximately $105,000.

(5) *Service to the Profession Generally*: In this category would be the activities that are of benefit both to the public and the Bar, but are of more direct benefit to the legal profession. These items would include public relations, legislative and information service, meetings, membership servicing, coordination with state and local associations, lawyer's retirement benefits, and many others, with appropriations of $205,000.

(6) *Service to the Practicing Lawyers:* Through its Sections the Association discharges its responsibility to assist lawyers in a more effective conduct of their law practice at a cost of approximately $127,000. The Sections in the "bread and butter" classification are substantially self-sustaining from the dues of their own members. Certain of the Sections engaging in public activities are given further assistance by appropriations from the general fund, and these have already been considered under the above classifications.

The requirements for adequate financial support of needed programs constantly exceed the Association funds available. The Association's income must be spread so thinly among the many worthwhile projects that there is simply not enough to go around. The activities of the Association are limited, not by the willingness of members to devote themselves to public service, nor by the need for such service, but primarily by the lack of funds properly to finance much-needed projects. To mention only one activity as illustrative, the program of maintaining minimum standards of legal education for which the Association has taken due credit is endangered by lack of funds to provide the necessary inspections and reinspections of law schools. This same condition can be observed on most of the projects as one goes down the list of activities.

Since the Association must look almost entirely to the lawyers of the country to provide the means to discharge the obligations of the Bar to itself and to the public, the wholehearted support of all lawyers is necessary to accomplish this.

Association's Financial Structure

Over the years the Association has tried to build up a general fund to provide for emergencies and to provide investment income. At the end of the last fiscal year there had been accumulated as our net worth in the General Fund, the JOURNAL, and the Section Funds approximately $394,000, which is represented by headquarters equipment, cash and in-

vestments, In addition to these funds, the Association acts as custodian or trustee of approximately $485,000 which is not available for general use, but which is earmarked for special purposes, such as the Erskine M. Ross Fund, the income of which is used to make the award for the annual Ross Essay. From time to time, the Association receives funds to be distributed by it for special purposes, such as the Traffic Court Program, which has attracted support from other organizations so that the appropriation of the Association now represents only a part of the total cost of the project.

This statement is intended only as a general informative review of the business of the Association for the benefit of those who are not members, and for those members who may not have familiarized themselves with the detailed audits included in the report of the Treasurer which is made at the Annual Meeting each year, and which appears in the bound *Annual Report of the Association*. It is hoped that this brief statement may give a clearer understanding as to how the business of the Association is conducted, and that it demonstrates the importance of the continued and expanded support of the legal profession for the accomplishment of our responsibilities to the public and to the professional needs of the Bar.

Howard W. Pollock Chosen As One of the Outstanding Young Men of 1955

■ Howard W. Pollock, 35-year old lawyer who last year was President of the American Law Student Association, has been honored by selection as one of the "Ten Outstanding Young Men" of 1955 by the United States Junior Chamber of Commerce. The American Law Student Association is sponsored by the American Bar Association.

Mr. Pollock was chosen for the national award on the basis of a remarkable record of achievement following World War II service as a Navy flier, during which he lost his right forearm in a grenade explosion. Despite that handicap he became a homesteader in Alaska, was elected to the Alaskan legislature, returned to the United States to complete his legal education at the University of Houston, and became President of the law student association. He returned to Alaska late last year to pursue his legal career in Anchorage. He has been referred to as the "pioneer with the iron fist" in recognition of his courageous homesteading venture and the mechanical hand he has worn since his war injury.

Since 1938 the United States Junior Chamber of Commerce has sponsored the Ten Outstanding Young Men program as a means of "informing the world that success in the American free enterprise system is still attainable to those who strive to achieve." Each year more than 10,000 nomination blanks are distributed in the search for young men, 21 through 35 years of age, who have made exceptional contributions to their profession and to their community, state and nation.

The awards to the ten men chosen in the 1955 competition were presented at a banquet in Springfield, Illinois, on January 14. Vice President Richard M. Nixon, himself an award winner in 1947, presented the awards and delivered the principal address.

In addition to Pollock, those receiving awards for 1955 were: Robert Alan Charpie, 30, Oak Ridge, Tennessee, assistant research director, Oak Ridge National Laboratory, for contributions to nuclear science and international nuclear planning; Dr. Denton A. Cooley, 35, Houston, Texas, associate professor of surgery, Baylor University, for original experiments and investigations in cardiovascular surgery; Edward D. Eddy, Jr., 34, Durham, New Hampshire, Vice President and Provost, University of New Hampshire, for his contributions to education in that state; Lt. Col. Frank K. Everest, 35, Edwards Air Force Base, California, test pilot, for his continued contributions to aeronautical progress and national defense; Irving R. Levine, 33, Pawtucket, Rhode Island, foreign correspondent, National Broadcasting Company, for his contributions to world understanding as a radio correspondent on permanent visa in Russia; Ruben Fred Mettler, 31, Shafter, California, engineering executive, Ramo-Wooldridge Corp., Los Angeles, for contributions in rocket fire control developments and classified military electronics; Thomas Schippers, 25, New York, New York, conductor, for contributions to the development of musicians, and sensitive, understanding interpretations in music; Charles H. Smith Jr., 35, Cleveland, Ohio, president, Steel Improvement & Forge Co., for pioneer efforts in the field of labor management relations; Rev. Leon Howard Sullivan, 33, Philadelphia, Pa., Pastor, Zion Baptist Church, for

(Continued on page 176)

Howard W. Pollock

Public Relations and the Bar:

The Program of the American Bar Association

by **Richard P. Tinkham** · *of the Indiana Bar (Hammond)*

■ **The Chairman of the Association's Committee on Public Relations here outlines the program and some of the concrete achievements of his Committee. This report is important to every lawyer and to every citizen, because, as Mr. Tinkham points out, in the long run, the administration of justice depends upon public confidence in the courts, and the courts in turn depend upon the vigorous and reputable Bar. This article is taken from an address delivered to the New England Law Institute at Boston, November 5.**

■ In recent years we have spent a great deal of time and money hunting down and prosecuting Communists and security risks. Yet for too many years we have ignored evils, which, to me and many others, constitute greater threats to our freedoms and our way of life. I am talking about the deep-seated disrespect for courts and lawyers and the public ignorance of their vital functions.

In a recent magazine article, the Chief Justice of the United States, in speaking of the current challenges to our system of justice, said:

> Yet no man who understands the nature and purpose of law will let these challenges go by default. There are at least three reasons why an American jurist must work, hope, and pray that the observance of law, the prestige of law, and the knowledge of law will be far more widespread a generation hence than they are now. . . . First of all, the U.S., as Americans have always known and loved it, cannot subsist without law. . . .

If we deprive America of its system of justice or those who administer that system, certainly anarchy and chaos are inevitable.

Many lawyers shudder when they hear the term "public relations". It connotes to them self-promotion, advertising and press agentry. By virtue of our attitude and our self-imposed standards of decorum and dignity, we have kept the public from knowing what we do, how we do it and our importance in the scheme of things.

Everyone seems to be confused about the meaning of the term "public relations"; even the experts are confused about it. It has been called a semantic trap. One of the top men in the field has defined it as: "Public relations deals with a complex constellation of dynamic forces." Another says: "Public relations is a combination of philosophy, sociology, economics, language, psychology, journalism, communication, and other knowledges in a system of human understanding." Another says: "Public relations is merely human decency which flows from a good heart."[1]

The definition I like best is: "Public relations is good performance publicly appreciated because it is adequately communicated"; in other words, appreciation by the public of good performance by the Bar.

I have the temerity to suggest that under this definition, we are lacking in two respects: First, our overall performance is not as good as it should be; and, second, what there is of it that is good has not been adequately communicated to the public.

Certainly something is wrong when members of the public believe that the teacher, the clergyman, the public officeholder and the merchant are more important to the community than the lawyer; when they do not know what a lawyer does, how he does it or what he is likely to charge; when they believe that a lawyer should be employed only after one is in trouble; that lawyers are less honest than other professional people; that more than a few lawyers will sell out if it is to their personal advantage; that it is wrong for a lawyer to defend a person accused of crime of which he is probably guilty; that justice is too slow and too expensive; that a large percentage of people would rather settle a lawsuit for one half of the amount claimed to be due, or less, than suffer the rigors of a lawsuit;

1. Fortune, November, 1955.

that lawyers will do dishonest things to protect their clients.

I did not concoct these accusations. They were developed as a result of public opinion polls taken in several states, including Iowa, California, Texas and Michigan.[2] They have been with us through the years in the writings of Dr. Johnson, Sir Thomas More, Samuel Taylor Coleridge, Shakespeare and many modern writers.

Some lawyers take the view that because the law lives in controversy, the relations of the lawyer with the public can never be good. Others take the view that the American Bar has been commercialized in the industrial revolution and has forever lost its tradition of and reputation for public service. There is, of course, some truth in both contentions. The unsuccessful litigant may tend to blame his lawyer and will not hesitate to tell his friends. We do have lawyers in all communities who are not professional men. Rather they are businessmen. We do have unethical and dishonest practitioners. So does every other profession and calling.

The Bad Repute of Business . . . *And What Was Done About It*

Business was in bad repute with the public not too long ago. Business has done something about it. The one hundred leading corporations in this country spend upwards of fifty million dollars per year on public relations activities. Five thousand companies have public relations counsel or public relations departments. Business is cleaning its own house. Its motto no longer is "The public be damned". It has established excellent methods of communication with its employees, its various publics and its stockholders. The president of one of our large corporations recently said:[3]

> I have finally come to realize that bad relations, whether with the community, with labor, or stockholders, usually come about due to not communicating things about the company that should be made known.

The recent and quite spectacular comeback of the Chrysler Corporation in the highly competitive automotive field is credited in part to the efforts of its new public relations department.

The Medical Profession . . . *Excellent Public Relations*

Among the professions, the doctors have done an excellent job in the field of public relations and are continuing to do so. They are spending more than three hundred thousand dollars a year in their efforts, while our appropriation is a very small fraction of that figure.

The task ahead of us is large. Often it seems that merely to hold our own is difficult. The Committee often feels like the Red Queen in *Through the Looking Glass*, who said, "It takes all the running you can do to stay in the same place." However, I believe we are making progress, and I hope we have just begun.

One problem is with the individual members of the Bar. Unless they are competent and honest, we cannot afford to represent them as competent and honest to the public. We have probably the most stringent code of ethics of any profession or calling. Where it has been adopted by the high courts of our states, this code is binding upon each of us as officers of that court. Yet how many of you have referred to the Canons of Ethics in recent years? How many of you know whether or not those Canons have been adopted by the high court of your state? Where adopted, is the code being enforced?

We must educate the lawyer to his own individual responsibility to the community, to his clients and to his fellow lawyers. In addition to this, we must afford him the opportunity to continue his legal education so that he can compete successfully with those who are greedily clawing at his practice.

The approach to the individual lawyer is a difficult one. He cannot be screened at the time of his admission to the Bar because those of us who have had something to do with admissions know that he is far too young and lacking in worldly contacts to have formed any character traits which are discoverable. He must be impressed, in some way, with his own terrible responsibility to the public and to his brothers at the Bar. He must be made to realize that if he is guilty of any offense, he injures not only himself but every other member of the Bar. He must be made to appreciate that if he is guilty of an offense, he will be promptly disciplined and perhaps disbarred.

The organized Bar is attempting to accomplish something in this field. Our Public Relations Committee inaugurated the custom last year of sending to lawyers a greeting for the new year, which features one of the Canons of Ethics. The first greeting dealt with Canon 17 and was entitled, "Respect Your Fellow Lawyer". It was well received and there were requests for many additional copies. One judge proposed to enlarge it and hang it in his courtroom. This year the greeting will probably treat with Canon 18 concerning the fair treatment of adverse witnesses.

I believe that most of us will concede that grievance procedure, where it exists at all, is inadequate and slow. Most grievance committees are composed of friends and competitors of the accused lawyer. Understandingly, these committeemen hesitate to act. The American Bar Association has a Special Committee working on a model grievance procedure code. A final draft of that code has been prepared and will be presented to the House of Delegates of the American Bar Association in February. It is hoped that this model code will be generally adopted and will result in more efficacious handling of grievance procedures and a consequent improvement in lawyer conduct.

Although the public believes it, we know it isn't true that the lawyer takes very little part in public activities. Look around in your own

2. See: *Lay Opinion of Iowa Courts and Lawyers*, Iowa State Bar Association, 1949; *What Texans Think of Lawyers*, Committee on Public Information, State Bar of Texas; *The Family and the Law*, Survey of the Legal Profession, 1949.

3. Op. cit. N.I.

communities. Lawyers are active in all charitable organizations and in many instances occupy executive positions. The public needs to know about these things, and bar associations should see that the public is reminded of them as frequently as possible.

In an issue several years ago, *Fortune* reported on a survey which found that the lawyer was losing valuable parts of his practice to insurance agents, banks and trust companies, accountants and others. One of the chief reasons for the invasion of this legal field by these non-lawyers was the failure of the lawyer to keep up to date in current developments in the law—his reluctance to assume new responsibilities. We all know lawyers who, when confronted with a tax problem, will call in an accountant. We know a few lawyers who have had their wills drawn by the trust department of a bank or trust company. Legal institutes for lawyers are the answer and they should be extensively noted in the media. When lawyers take the time and spend the money necessary to continue their educations, the public is entitled to know about it.

Public relations is, indeed, a broad field. It is almost as broad as some of the professional public relations people try to make it. A part of our effort must be the improvement of the administration of justice. I presume many of you saw Judge Samuel Hofstadter's article in *The Saturday Evening Post* of October 22, 1955, entitled, "Let's Put Some Sense into the Accident Laws". Judge Hofstadter advocates a sort of workmen's compensation arrangement for traffic cases. Unless we can expedite the administration of justice, I am afraid we are headed for something of that kind. I believe it was Judge Learned Hand who said:

> I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.

We must make legal services available to all. We are making progress in this through our Legal Aid Societies and our Lawyer Referral Services. More than one hundred sixty cities now provide Legal Aid services at no cost for those who cannot afford to pay fees, and more than one hundred cities now have Lawyer Referral service for those who are seeking a lawyer but don't know how to select one. These services should be extended.

We are working with the press, the radio and television. We have had several meetings with representatives of the National Association of Radio and Television Broadcasters, the Newspaper Publishers Association and the American Society of Newspaper Editors. We believe that we are beginning to understand their problems in the matter of freedom of information, and that they are beginning to understand ours. We have not approached the media of communications with a belligerent or critical attitude but rather with an offer of co-operation. We have offered our services to them in order to provide accurate information about the profession and the courts. We have also offered consultative guidance to writers and producers in the hope of eliminating inaccuracies and needless misrepresentation. This has been productive of results. As an illustration, a recent book of fiction was very critical of lawyers in general. When it was made into a moving picture, our suggestions to the producer were heeded, or at least we like to think so, and the lawyer received far more favorable treatment than he did in the book. We are doing the same thing with magazine publishers and writers. You may have noticed several articles on legal topics in *The Reader's Digest* by Mr. Jerome Beatty. The Public Relations Committee co-operated in the furnishing of material and leads for several of these articles and is at present co-operating in furnishing leads for another. I could give you other illustrations.

We have entered the motion picture field and have produced a documentary motion picture, entitled *Dedication to Justice,* which was inspired by the dedication of the American Bar Center at Chicago in 1954. The picture is a panel discussion in which well-known lawyers and judges participate, with Eric Sevareid as moderator; it attempts to tell the story of the organized Bar and what it is trying to accomplish for the benefit of the public and the Bar. At present it is being circulated among state and local bar associations, and I am happy to say that since its release in July, the fifty copies of the picture have been in constant circulation throughout the country. It is also designed for showing to lay audiences, and we have had experimental showings to civic clubs. The reception of the picture has generally been excellent.

Richard P. Tinkham, Chairman of the Association's Committee on Public Relations, was admitted to the Indiana Bar in 1928 and practices in Hammond. A former President of the Indiana State Bar Association, he was elected to membership on the Board of Governors of the American Bar Association in 1953.

One of the activities of the American Bar Association Committee which has resulted in the stimulation of much public relations activity on the part of state and local bar associations was the publication in 1953 of the "how-to-do-it" manual, *Public Relations for Bar Associations.* Several thousand copies have been distributed. Consideration is being given to the publication of a new edition.

Almost every state association and many local associations now have

active public relations committees, and the volume of material which is issued by these committees is formidable. Pamphlets have been a favorite activity. Some states have prepared and distributed as many as fifteen or twenty of these pamphlets on different legal subjects. They have been enthusiastically received and have been re-ordered on many occasions. They are helping to acquaint more people with the functions of courts and lawyers and their value to our society.

Allied closely with the pamphlet activity is the newspaper column idea. Many states, including Minnesota, California, Wisconsin, Florida, Oklahoma and Ohio, prepare a weekly column on a legal subject and distribute it to newspapers throughout the state. This is widely printed without charge, and generally under a distinctive head, as a public service.

Television is a rapidly developing field of activity. A number of state and local associations have produced excellent programs that are broadcast as a "public service" through the co-operation of TV stations. In many cases these programs present a panel of lawyers who discuss everyday legal problems. Some are commercially sponsored. In the nationally televised show, *Justice,* which is produced in co-operation with the National Legal Aid Association, the role of the lawyer in legal aid work is made known to tens of thousands of persons who would otherwise be unaware of it. Our Committee is seeking more vehicles of this type and is currently negotiating with several producers.

At the same time, the Public Relations Committee has been vigilant to protect the interests of the lawyer in this medium. At our request, several sequences in a television serial were withdrawn and refilmed because the lawyer involved was depicted in such a manner as to discredit the entire profession. In other instances, we have complained about the treatment that lawyers have received with the same spirit of co-operation which we have pursued with the press. We believe that this effort is beginning to bear fruit.

Many bar associations have secured the co-operation of banks, trust companies, title companies and insurance companies in the effort to win good will for the profession. Outstanding among those participating is the John Hancock Mutual Life Insurance Company. You will recall the beautiful advertisements in color entitled "We Call Him 'His Honor' To Remind Us of Our Own", and "He Well and Truly Tries", being tributes to the judges of the country and to the jury system. Many other illustrations could be given.

I have tried to tell you some of the things we have done and are doing. We have great plans for the future. These plans involve radio, television, motion pictures, the press, and a National Speakers' Bureau. Judge Bolitha Laws of Washington, D.C., has recently consented to act as chairman of this bureau. It will be the function of the bureau to provide lawyer-speakers for lay meetings and assemblies in furtherance of our effort to educate the public as to what the lawyer does, how he does it, and his importance to his community.

During all this time, we have, of course, maintained our policy of issuing regular news stories concerning the activities of the organized Bar and the individual members thereof; publishing of *The Coordinator* twice each month in order to keep officers of bar associations informed as to the recent developments in the activities of the organized Bar, including the public relations field and many other day-to-day chores.

I hope I have left with you some conception of the necessity for improving our relations with the public, a few ideas of what is being done about it, and some inspiration to help.

Many years ago, Count Alexis de Tocqueville of France said after an American visit that the lawyer was the aristocrat of the democracy. Let us hope that in the not-too-far-distant future, we can say that we have regained that cherished reputation which, through the years, has been lost or obscured by our own reticence and inaction.

Illinois Adopts Uniform Traffic Ticket and Complaint

■ On January 3, 1956, Illinois became the fifth state to adopt the uniform traffic ticket and complaint as recommended by the American Bar Association.

So as to assist the public officials of the state of Illinois in properly using the ticket, James P. Economos, Director of the Traffic Court Program, established a three-day training school in each state police district. These were well attended and most helpful in helping to explain the ticket.

The Uniform Traffic Ticket and Complaint (1) permits uniform interpretation of traffic laws by all officers; (2) permits uniformity of instructions to all officers and administrative personnel within the police department; (3) permits prosecutors to secure more consistent and uniform case preparation; (4) acquaints the violator with the exact nature of the violation charged; and (5) acquaints the public with the kind of unsafe maneuvers which result in accidents.

Other states already using the ticket and complaint are: New York, New Jersey, North Dakota and Michigan. In addition, more than 1500 cities have adopted it in one form or another.

Further information may be obtained by writing to the Traffic Court Program, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois.

The Legal Draftsman:

The Use of Forms in Tax Planning

by **Jacob Rabkin** • *of the New York Bar (New York City)*

▪ Taxes are ubiquitous. As the April 15 deadline for filing 1955 income tax returns approaches, everyone will become acutely conscious of taxes and the tax burden, and a great national sigh of relief will go up on the week end of April 16 when the annual headache has finally run its course, and the layman can go back to his golf, his garden, taking down the storm windows or whatever else his week-end routine calls for. But lawyers do not—or at least should not—shed their awareness of the tax consequences of modern life. A complex tax structure such as ours affects hundreds of transactions that are part of the daily routine of lawyers the year around. Mr. Rabkin discusses the tax aspects of drafting legal documents. As he points out, a good repair and restoration clause in a lease drawn for a landlord cannot be imported into the tax field without caution, or the landlord may lose his depreciation deduction. The enumeration of unnecessary powers in a business or investment trust may be harmless for most purposes, but it may mean that the Commissioner will treat the trust as an association taxable as a corporation.

▪ The idea of an institute on how to transfuse tax knowledge into the bloodstream of legal documents was a pedagogical inspiration. For more than a decade now the various institutes around the country have been conducted primarily as advanced seminars on the rules of the tax law. Occasionally, a concession has been made to craftsmanship. Some institutes have experimented with such subjects as "How To Try a Tax Court Case", "How To Conduct a Tax Conference", and "How To Prepare a Tax Protest". One of the most common practical problems of the lawyer is that of producing legal documents which reflect his combined knowledge of both the local law and the federal tax law.

We take for granted, of course, that a knowledge of both these laws is a prerequisite for good draftsmanship. But this is never enough. Most of us recognize that there is a delicate skill in applying this knowledge to a specific transaction. And there is an equally significant skill in reducing the specific transaction to the rigid shape of a legal document. The tax law has injected a special problem into the field of draftsmanship. The legal document which establishes the expected balance between private parties is no longer always adequate. Most transactions today must take into account the rights of the Federal Government. These rights are somewhat like those of a third party beneficiary with an irrevocable interest.

The "Non-Tax" Agreement

The first job of the draftsman is to recognize the transaction in which these rights of the Government must be considered before the legal document is drawn. There are still many transactions which fall outside this category, although the number is constantly diminishing. A real estate contract is drawn for the sale of a home for an all-cash price. On the closing, gain or loss is realized by the seller and a basis is established for the buyer. The draftsman has no control over those consequences. Articles of incorporation are filed and property is transferred to the new corporation by the incorporators in exchange for common stock. Taxability or nontaxability of those transfers will depend upon the external facts, not upon the form or language of the agreements. I do not mean that the lawyer discharges his full obligation solely by drafting a clear and complete legal document. He may have to advise the seller in the first case of his right to defer the tax on all or part of his gain by purchasing or constructing a new residence within a year after the sale.[1] He may

1. Int. Rev. Code (1954) §1034.

consider it advisable to discuss with the incorporators in the second case the wisdom of issuing both preferred and common stock on original incorporation to avoid in the future the statutory restrictions on "bail-out" stock.[2] Tax problems are inherent even in these simple transactions. My point is that once this type of transaction has been agreed upon the tax consequences of the arrangement need not be considered in the actual drafting of the legal documents. The sole concern of the draftsman is to record the transaction in accordance with principles of local law.

The Straddle Transaction

There are, however, many transactions which are perfectly adequate under local law, but which are incomplete for the purposes of the tax law. In these situations the lawyer must supply the missing ingredient before he undertakes to draft the legal documents. Otherwise, tax consequences are unnecessarily unpredictable. Take, for example, a contract for the sale of stock with the understanding that dividends paid prior to the completion of the sale are to be applied in reduction of the selling price. Whether these intervening dividends are taxable to one party or to the other may depend on the date when the sale is actually completed. This question has been the cause of litigation in a number of cases because the precise date for the shift in rights of ownership was not clearly defined.[3] A similar problem exists where a percentage of future income is to be applied against the selling price of a business. Litigation in that situation has turned on whether the purchaser had acquired a sufficient interest in the business so that its income could be attributable to him.[4] A more graphic example is the sale for a lump sum of a going business with mixed assets, including a restrictive covenant against competition. Local law makes no requirement for an allocation of the purchase price among the assets acquired by the purchaser. But because of the correlative advantages and disadvantages to seller and purchaser, the tax law will generally respect an allocation arrived at as a result of bargaining between the parties.[5] In the absence of such an allocation, tax consequences are unpredictable.

These are typical "straddle" transactions in which both parties are left in tax doubt. If the parties deliberately negotiate for uncertainty, each in the hope that the other will bear a disproportionate tax burden, the responsibility is not the draftsman's. The litigated cases indicate, however, that most of these situations develop because of a lack of knowledge of the tax problem, not by calculated design. In many of them both parties become engaged in tax controversy. In such event, neither draftsman can defend his oversight of the tax factor.

The Hybrid Transaction

The counterpart of the straddle transaction is the hybrid transaction. Here, there is no omission of a contractual feature essential for tax purposes. The fault lies in a failure to define the precise legal relationship between the parties. The simplest illustration is the corporate security with mixed attributes. In these cases it is difficult to distinguish between a security which is in fact an indebtedness carrying with it an obligation for interest and a security which is in fact a stock carrying with it merely an obligation to pay dividends.[6] Another common illustration is the disposition of property through a "lease-option" arrangement. The basic question in these cases is whether a sale is to be recognized before the formal exercise of the option. This question determines whether the lessor has rent income or sales proceeds, and whether the lessee has a rent deduction or a capital expenditure.[7]

The common characteristic of the straddle and hybrid transaction is the tax doubt created by the legal instruments. Those instruments may adequately record the agreement of the parties as between themselves. But, unless the tax uncertainty is deliberate, these instruments display faulty draftsmanship because they foreclose a reasonable prediction of the obligation of the parties to the Government.

Indemnification Against Tax Liability of Another

The converse of these indefinite tax transactions are those in which the contracting parties openly negotiate on an issue of tax liability and frankly undertake to achieve a specific objective. The most common illustration is the agreement which contains an indemnity for the benefit of one party against the tax liability of another. The purchaser of the entire stock of a corporation would normally protect himself not only against unknown and contingent claims of business creditors of the corporation, but against unknown and contingent tax liabilities of the corporation as well. A lender in an unsecured transaction might properly insist upon guarantees for the payment of the borrower's tax liabilities in order to avoid the issue of priority in the event of the borrower's insolvency. On the contribution of an appreciated asset to a partnership, the non-contributing partners may call for some protection against the possibility that the basis of the contributed asset may be less than the amount represented by the contributing partner.[8] In these cases the

2. Int. Rev. Code (1954) §306.

3. *Moore* v. *Comm.*, 124 F. 2d 991 (7th Cir. 1941), *reversing*, 42 B. T. A. 949 (1940); *DeGuire* v. *Higgins*, 159 F. 2d 921 (2d Cir. 1947), *cert. denied*, 331 U. S. 858 (1947); *Northern Trust Co.* v. *U. S.*, 193 F. 2d 127 (7th Cir. 1951), *cert. denied*, 343 U. S. 956 (1952); *Arthur L. Hobson Estate*, 17 T. C. 854 (1951).

4. *Vermont Transit Co.*, 19 T. C. 1040 (1953), *aff'd*, 218 F. 2d 468 (2d Cir. 1955); see *Joy Mfg. Co.*, 23 T. C. ±137 (1955).

5. *J. S. L. Restaurants, Inc.*, T. C. Memo., 10 T. C. M. 180, C.C.H. 18,165, P-H ¶51,056 (1951). This rule has been applied in allocating ordinary income to the seller even though he did not appreciate the tax consequences of the agreement. *Clarence C. Hamlin Trust*, 19 T. C. 718 (1953), *aff'd*, 209 F. 2d 761 (10th Cir. 1954).

6. *Kelley Co.* v. *Comm.*, 326 U. S. 521 (1946); see Rabkin & Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION §37.10.

7. *Benton* v. *Comm.*, 197 F. 2d 745 (4th Cir. 1952); *Clarence B. Eaton Estate*, 10 T. C. 869 (1948); *Judson Mills*, 11 T. C. 25 (1948); *Truman Bowen*, 12 T. C. 446 (1949); *Chicago Stoker Corp.*, 14 T. C. 441 (1950); *East Coast Equipment Co.*, 21 T. C. 112 (1953); *Breece Veneer & Panel Co.*, 22 T. C. 1386 (1954).

8. See Rabkin & Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Form 1.11.

draftsman must treat the tax liability of one of the parties as he would treat any other factor which might affect the values or the security bargained for by his client. The drafting itself presents no unique problem. The concern of the draftsman is to see that the tax liability is ultimately paid by the party primarily responsible for it.

Shifting a Tax Burden to Another

The problem becomes more complex when instead of protecting a taxpayer against the impact of the obligation of another, the taxpayer wants to shift his own tax obligation away from himself. There are many situations in which this problem arises. A donor may make a gift but may want to be relieved of the payment of the gift tax. If by contract the gift is conditioned upon the donee's payment of the gift tax, the value of the gift is reduced by the tax which in turn reduces the amount of the tax.[9] Tax-free compensation agreements and tax-free rent agreements present another aspect of this mathematical problem. In these latter cases, the employee or the landlord wants to receive a "net" amount—free from any tax obligation. The total taxes incurred by the employer in one case and by the tenant in the other are taxable income to the employee and to the landlord, respectively. Total taxes, however, may include a tax on a tax on a tax.[10] The drafting of these agreements should not be undertaken without a full understanding of the probable effect of this progression.

How does the drattsman prepare for the possible failure of the tax objective? In the first place, he must recognize the potentiality for conflict. It was just this ability that must have inspired the lawyer who applied to a district court for the perpetuation of the testimony of witnesses in anticipation of the possible contention by the Commissioner that a transfer by his client was made in contemplation of death.[11] The failure to recognize the potentiality for tax conflict is a common feature of intra-family transactions. A gift of property is made to a child with no convincing record of delivery.[12] Rent to a related taxpayer is increased without the precaution of a supporting appraisal of value.[13] An interest in literary property is assigned to a member of the family without notification to the publisher.[14] The tax-conscious draftsman would rarely overlook the simple precautions required to settle the tax consequences for the participants in these situations.

In the second place, the draftsman can suggest a conditional transaction. A common technique is the transaction conditioned upon a favorable tax ruling. A purchase and leaseback arrangement may be negotiated which shows a good financial return. The deal is a good one, however, only if the leaseback is recognized, so that the purchaser has a deduction for depreciation to offset against his rental income. The draftsman may make a valuable contribution if he suggests that the transaction be conditioned upon the issuance of a favorable ruling by the Internal Revenue Service. The condition need not operate unilaterally. The contract can be binding upon both sides if the ruling turns out to be favorable.

Finally, the draftsman may provide for the possible failure of the tax objective, as he would for any other contingency. Suppose a corporation is being organized in which 65 per cent of the incorporator's money is represented by stock and 35 per cent by debentures. There is the possibility that these debentures will be treated as stock. This may not be as costly for some of the investors as it may be for others. The high bracket investors may insist on protection against this possibility. In the normal case the due dates of such debentures are spread over many years. The protection, though limited, may take the form of an agreement by all the parties to make a capital contribution of those debentures which are still outstanding whenever a tax attack is made upon the corporation's capital structure. Parties to an alimony agreement almost always take the tax impact into account in fixing the amount and duration of the payments. Interpretations by the courts in the last year or so on the effect of an interlocutory decree[15] and on the meaning of "periodic payments"[16] have resulted in the distortion of the understanding of many taxpayers.

Jacob Rabkin is a graduate of New York University School of Law. Admitted to the New York Bar in 1928, he is the co-author and co-editor of "Federal Income, Gift and Estate Taxation" and "Current Legal Forms with Tax Analysis". He has contributed many articles to various legal journals and other publications.

9. *Sarah H. Harrison*, 17 T. C. 1350 (1952). But, where the subsequent payment of tax is merely voluntary, it is not taken into account in the valuation. *Estelle M. Affelder*, 7 T. C. 1190 (1946); see *Moore* v. *Comm.*, 146 F. 2d 824 (2d Cir. 1945).

10. Mim. 6779, 1952-1 C.B. 8, as amended by I. R.-Mim. 51, 1952-2 C. B. 65.

11. *Petition of Marion B. Ernst*, 30 A.F.T.A. 1496, 42-2 U.S.T.C. ¶10,201 (D. Ct. Cal., July 9, 1942).

12. *Ludwig Bendix*, 14 T. C. 681 (1950); see Rev. Rul. 54-135, 1954-1 C. B. 205; *cf. Visintainer* v. *Comm.*, 187 F. 2d 519 (10th Cir. 1951), *cert. denied*, 342 U. S. 858 (1951).

13. *Roland P. Place*, 17 T. C. 199 (1951), *aff'd*, 199 F. 2d 373 (6th Cir. 1952), *cert. denied*, 344 U. S. 927 (1953).

14. *Wodehouse* v. *Comm.*, 178 F. 2d 987 (4th Cir. 1949); *cf. Wodehouse* v. *Comm.*, 177 F. 2d 881 (2d Cir. 1949).

15. *Alice H. Evans*, 19 T. C. 1102 (1953), *aff'd*, 211 F. 2d 378 (10th Cir. 1954). *Contra*, Rev. Rul. 55-178, 1955-13, I. R. B. 31. Questions concerning the effect of an interlocutory decree have been only partially settled by the 1954 Code. Aarons, *Divorce and Separate Maintenance Under the New Code*, 41 A.B.A.J. 752 (1955).

16. *Davidson* v. *Comm.*, 219 F. 2d 147 (9th Cir. 1955); *Prewett* v. *Comm.*, 221 F. 2d 250 (8th Cir. 1955); see *Myers* v. *Comm.*, 212 F. 2d 448 (9th Cir. 1954).

Advance protection against the failure of the tax objective should be considered in every case where there is a reasonable doubt that the expectation of the parties may be fulfilled.

The primary function of the draftsman is, therefore, clear. He must refine the stipulations of the parties so that their tax responsibilities are not unnecessarily uncertain, and he must protect his own party against a tax burden which the other has agreed to assume. In most cases this can be done by plainly stating the tax objective and by providing specifically for the possible failure of that objective.

The Sham Transaction

The second function of the draftsman is to recognize the limitations on the usefulness of particular phraseology in legal documents. The tax law was quick to develop a rare combination of insight and sophistication. It refuses to accept at full value a legal form which merely misinforms. It is the most forceful exponent of the doctrine of reality and substance.

Thus, the tax law will not be deceived by the sham transaction, however skillfully it is camouflaged with the ink of legal verbalisms. True assignments of income, whether in the form of a partnership or a trust, are recognized for what they are.[17] A dividend is taxed as such, whether disguised as compensation or rent.[18] Payments which are in fact installments of purchase price are not deductible, even though they are called rent.[19] The income of a business which depends upon the efforts of one person cannot be diverted to another through the device of operating the business in the latter's name or even with the latter's funds.[20]

The Reciprocal Transaction

The tax law has more than an ability to look through a transaction. Early in its history it developed a wide-angle vision, so that it could see sidewise, as well as forward. A trust instrument may have one tax meaning when examined by itself, but an entirely different one when read alongside of a reciprocal trust created by another.[21] Income of property may be taxed to a donor and not to the donee where the latter makes substantial gifts back to the donor or to members of his family.[22] A corporation is not entitled to a loss upon a sale to a "straw man" under an agreement giving its stockholders an option to purchase.[23] The doctrine of reciprocity dictates the integration of these dependent events. The formal details of carrying out these transactions are ignored. The significance of one document is cancelled out by the meaning of another.

The Step Transaction

The versatility of the tax law did not stop at this point. It developed the "step transaction" doctrine, which displays an ability for looking forward and backward at the same time. A gift of stock in a corporation committed to liquidation has been treated as a gift of the liquidation distribution, with the liquidation gain taxed to the donor.[24] A deduction for rent has been disallowed where the property was originally owned by the corporation and was sold to its stockholders in contemplation of a leaseback.[25] Successive redemptions of different stockholders' shares over a period of time, resulting ultimately in re-establishment of the same proportionate interests, was found to be part of a single plan for dividend distribution even before the 1954 legislation on this subject.[26] The corporate reorganization field is filled with cases in which different steps are reassembled so that they are part of the same tax structure.[27] The tax law, therefore, refuses to measure time by the interval between legal documents. It possesses a clairvoyant ability to look beyond the lawyer's language and to see the real intent of the parties.

The "Side" Agreement

This subject of the limited usefulness of legal documents cannot be closed without a comment on a peculiar phenomenon of the tax law. This is the document known as the "side" agreement. Its only function is to keep the Government ignorant of some detail of the transaction. In a brazen case it may be an agreement to resell securities to a taxpayer who wants to achieve his tax loss despite the wash sale provisions of the statute. When the time factor is significant it may be an agreement to sell in the future part of the stock received in a transaction which would otherwise qualify as a nontaxable transfer to a controlled corporation. When the issue of compensation is involved it may be an agreement to redeem the stock of an employee at a price which reflects the value of future personal services. In its more subtle form it may be an agreement to retire corporate bonds at a premium long before their due date. In each instance the document is designed to control future conduct.

(Continued on page 192)

17. *Helvering* v. *Clifford*, 309 U.S. 331 (1940); *Comm.* v. *Tower*, 327 U. S. 280 (1946); *Comm.* v. *Culbertson*, 337 U. S. 733 (1949).

18. *Kennedy Name Plate Co.* v. *Comm.*, 170 F. 2d 196 (9th Cir. 1948); *Limericks, Inc.*, 7 T. C. 1129 (1946), *aff'd*, 165 F. 2d 483 (5th Cir. 1948).

19. *Citizens Nat'l Bank of Kirksville* v. *Comm.*, 122 F. 2d 1011 (8th Cir. 1941), *cert. denied*, 315 U. S. 822 (1942); *Alexander W. Smith, Jr.*, 20 B. T. A. 27 (1930); *Robert A. Taft*, 27 B.T.A. 808 (1933).

20. *Albert Nelson*, 6 T. C. 764 (1946); *Wade Allen*, 6 T. C. 899 (1946); *Robert E. Werner*, 7 T. C. 39 (1946); *Clay H. Brock*, 22 T. C. 284 (1954); *Wallace O. Leonard*, 11 T. C. M. 12, T. C. Memo., C.C.H. 18,731, P-H ¶52,001 (1952), *aff'd*, 203 F. 2d 566 (6th Cir. 1953), *rehearing denied*, 206 F. 2d 277 (6th Cir. 1953), *cert. denied*, 346 U. S. 876 (1953).

21. *Lehman* v. *Comm.*, 109 F. 2d 99 (2d Cir. 1948), *cert. denied*, 310 U. S. 637 (1940); *Comm.* v. *Warner*, 127 F. 2d 913 (9th Cir. 1942).

22. *Hilda M. Royce*, 18 T. C. 761 (1952); see *David J. Pleason*, 22 T. C. 361 (1954).

23. *Russell Box Co.* v. *Comm.*, 208 F. 2d 452 (1st Cir. 1953).

24. *Howard Cook*, 5 T. C. 908 (1945); see *Robert Lubets*, 5 T. C. 954 (1945).

25. *Catherine G. Armston*, 12 T. C. 539 (1949), *aff'd*, 188 F. 2d 531 (5th Cir. 1951); see *Ingle Coal Corp.* v. *Comm.*, 174 F. 2d 569 (7th Cir. 1949); *Ingle Coal Corp.* v. *U. S.*, 127 F. Supp. 573 (Ct. Cl. 1955); *cf. Brown* v *Comm.*, 180 F. 2d 926 (3d Cir. 1950), *cert. denied*, 340 U. S. 814 (1950).

26. *James F. Boyle*, 14 T. C. 1382 (1950), *aff'd*, 187 F. 2d 537 (3d Cir. 1951), *cert. denied*, 342 U. S. 817 (1951). As to the present statutory provision, see Int. Rev. Code (1954) §302 (b)(2)(D).

27. Rabkin & Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION §32.07. The step transaction doctrine can frequently operate in favor of the taxpayer. See *Western Wine & Liquor Co.*, 18 T. C. 1090 (1952).

The Legal Aid Program:

Help Must Come from the Judiciary

by **Orison S. Marden** · *of the New York Bar (New York City)*

▪ **The Sixth Amendment to the Constitution guarantees every accused the right to a speedy and impartial trial, yet this guarantee can easily be a mockery without trained legal advice. It is disturbing to note Mr. Marden's statement that half of all defendants accused of crime lack the means of paying even a modest lawyer's fee. The old-fashioned solution, court appointment of counsel, no longer is practical in many of our larger cities, and the Private Defender and the Public Defender Systems have been developed to meet the modern need. Much work remains to be done, however; Mr. Marden calls upon the members of the judiciary to use their influence in setting up needed machinery. Who has a better right, or a higher duty, to assure equal justice under law, he asks.**

▪ The Legal Aid movement has made rapid strides during the past ten years in setting up new facilities to handle civil matters for the poor. At the close of 1954, 161 Legal Aid offices were in operation, together with seventy-two volunteer committees. This is to be contrasted with sixty-four offices and fifty-four volunteer committees in December, 1945.

The American Bar Association Committee on Legal Aid Work and the National Legal Aid Association, partners in the promotional campaign which has brought this about, freely acknowledge that these results have been due in substantial part to active support and leadership by members of the judiciary.

Chief Justice Earl Warren and several of his predecessors have served as Honorary Presidents of the National Legal Aid Association. Many members of the judiciary, both federal and state, in all parts of the country, have fought in our front ranks. Moreover, they have given inspiration and courage when it was most needed, and their example has persuaded others to follow.

Some progress has been made on the criminal side, but it has been only half that achieved for civil cases, despite the fact that criminal charges are more serious for the individuals involved and that miscarriages of justice in these cases may constitute a graver threat to the administration of justice.

Only forty-two cities now have organized facilities for representation of poor persons accused of crime, an increase of eighteen since 1945. Yet more than half of all defendants accused of crime lack the means to pay even a modest lawyer's fee.[1] Surely this is one of the gravest problems involved in what our Chief Justice has called "America's Quest for Equal Justice Under Law".[2]

The organized Bar has repeatedly called attention to the importance of providing adequate legal assistance for the indigent in criminal cases. However, the means or method for supplying this assistance has —rightly, I think—been left for decision at the state or local level. In its 1940 report, the Standing Committee on Legal Aid Work of the American Bar Association stated the position of the Association as follows:

> In connection with legal aid in the Criminal Courts, the Committee wishes to end any uncertainty that may have existed as to the position of the American Bar Association in connection with the relative merits of public and private defenders. The position of the American Bar Association is that the method and instrumentality of securing adequate representation of poor defendants in the Criminal Courts is a local question for determination in the light of local conditions, needs and wishes. The concern of the Association is to secure proper representation of poor defendants in the Criminal Courts as broadly and as promptly as possible without preference or partiality as to method or instrumentality. [65 *A.B.A. Rep.* 431].

This report was accompanied by

1. Emery A. Brownell, *Legal Aid in the United States* (1951), pages 83-86; William M. Beaney, *The Right to Counsel in American Courts* (1955), page 203.
2. 41 A.B.A.J. 1008-1010 (1955).

Orison S. Marden is the newly elected President of the National Legal Aid Association. A member of the New York Bar, he practices in New York City and has been active in the work of the organized Bar for many years. He is Chairman of the Standing Committee on Lawyer Referral Service of the American Bar Association.

certain recommended resolutions, practically all of which were adopted by the House of Delegates (65 *A.B.A. Rep.* 431-2). One of the "whereas" clauses of the resolutions as adopted reads:

> *Whereas,* the method and instrumentality, whether public or private, to be adopted in rendering legal aid should be determined by local conditions, needs and wishes.

There then followed this resolution:

> *Resolved,* that the Committee call upon and cooperate with state and local bar associations throughout the country in the establishment of organized legal aid by such method and instrumentality, whether public or private, as may be determined by local conditions, needs and wishes.

Thus, the American Bar Association, for at least fifteen years, has pressed for, and continues to advocate the prompt establishment of adequate Legal Aid facilities in criminal matters, whether by public or private means, as local conditions may dictate. The position of the National Legal Aid Association is precisely the same.

Both associations, however, have pointed to the defects inherent in the assignment system, particularly in the larger cities.[3] The compulsory rotation of attorneys by court rule, now in force in the New Jersey state courts, represents an improvement over the haphazard assignment method; its efficiency is currently under survey.

The important essentials of a defender service worth its salt in preserving American concepts of justice are (1) that it is adequate to meet the full need, and (2) that it measures up in quality and independence to the private Bar. No single system can lay exclusive claim to these basic essentials. A variety of methods to choose from are in successful operation across the country.

Now, I come to the real point of this article: Help from the judiciary is badly needed to inspire the Bar and the community to provide the necessary machinery.

Both laymen and lawyers look upon our judges as our natural leaders in matters affecting the administration of justice. While we realize that the judiciary cannot properly act in some matters where lawyers are free to tread, I suggest that on this vital subject the initial inspiration and pressure may and indeed should come from the Bench.

Our judges know the real need better than anyone else. They have every right to call upon the Bar and upon the community to supply the machinery they need in order to assure equal justice under law in their courts. Who indeed has a better right? And I would add: who has a higher duty?

A dramatic appeal to key community leaders, to the top lawyers, businessmen and bankers, the mayor and legislative leaders, Community Chest officials may accomplish the desired result in a single session. Generally, however, there will have to be gentle pressure from time to time until the mission is accomplished. Sometimes, too, firmness must be added to the gentle pressure!

The appeal should utilize to the full the prestige of high judicial office. It may be held in the courtroom, or at a bar dinner or other appropriate function. The press will invariably give excellent support and its representatives should, of course, be invited.

The presiding judge should dramatize the lot of the defendant as opposed to the resources of the government prosecutor. He should picture the community disgrace that comes from conviction of the innocent; and the constitutional and practical necessity of expert assistance of counsel in any case, whether the defendant be guilty or innocent.

The meeting should be carefully planned—with key people to speak up at just the right time with conviction and understanding of the traditional, and, let us remember, the necessary role of the lawyer in our system of adversary proceedings.

The court, of course, should determine in advance, in consultation with bar leaders, the local requirements and the method desired to meet those requirements. The defender service may be organized as a private agency, supported in whole or in part by the Community Chest or other private means. Or the private agency (perhaps affiliated with or a part of the local Legal Aid office handling civil matters) may receive some or all of its support from the public treasury. Or the community may prefer an organized assignment system, enforced by court rule, along the lines of the New Jersey plan. If a public defender is desired, appropriate legislation will probably be necessary.

The National Legal Aid Association and the Standing Committee on Legal Aid Work of the American Bar Association can be of real assistance in making these plans. A letter or telephone call to either association, at the American Bar Center, Chicago 37 (telephone HYde Park 3-0533), will bring expert advice and prompt co-operation.

City and county efforts will of course be more effective if supported in person or in writing by a representative of the highest court of the state.

3. Brownell, *op. cit.* pages 136-143; Beaney, *op. cit.* pages 212-216.

There is no doubt that it can be done. Examples come readily to mind:

In early 1947 Judge (now Chief Judge) Albert Conway of the New York Court of Appeals called upon the New York State Bar Association to "make a fresh and adequate approach . . . to the subject of legal aid" because "All right-thinking men agree that a person requiring the advice or assistance of a lawyer should receive it whether or not he can afford it." Judge Conway's address gave substantial impetus to promotional work then getting under way in his state.

An outstanding example of judicial initiative occurred in New Jersey several years ago. Chief Justice Arthur T. Vanderbilt arranged a dinner meeting to which lay leaders and representatives of the press were invited, along with leaders of the Bar. The Chief Justice outlined the community values of organized Legal Aid facilities and urged the establishment of a Legal Aid society in each county of his state. Within a single year, through spirited implementation by bar leaders, the initial objective had been substantially realized.[4]

On the criminal side, under the joint leadership of Chief Justice Vanderbilt and Judge Richard Hartshorne, a statewide system for assignment of counsel to indigent defendants was inaugurated.[5]

Chief Judge John C. Knox of the United States District Court for the Southern District of New York had reached the saturation point of frustration, when, some eight years ago, he appeared before the annual meeting of the local Legal Aid Society. In a memorable address he gave his listeners a glimpse into the mind and conscience of the judge presiding at criminal term in respect of inadequate representation for the indigent defendant. Even the most sophisticated members of his audience were deeply stirred.

Spurred on by the authority and eloquence of Chief Judge Knox, lawyers and laymen alike co-operated to supply the organized facilities needed in his court. The Criminal Courts Branch of the local Legal Aid Society, entirely dependent on voluntary subscriptions, did not then have sufficient income to extend its services to the federal court. Accordingly, the Legal Aid Committee of The Association of the Bar of the City of New York undertook to raise a sum sufficient to cover the cost of service in the Federal Court for a three-year period. It was felt that if the service operated for three years the public would wish it to continue and would increase their subscriptions accordingly.

The necessary funds were raised in due course and the contributing public has now accepted this extension of Legal Aid service as a necessary obligation of the community. I am sure that any member of the court would testify to the high quality of the service and to the burden it has taken from the judges and from the unfortunate members of the Bar who had been carrying most court assignments.

Within the past few weeks, the Chief Justice of the United States has given a striking public illustration of his deep interest in Legal Aid and his concern that it is not more widespread. In an article entitled "The Law and the Future", published in the November, 1955, issue of *Fortune*, Chief Justice Warren said in part:

> Unequal justice is a contradiction in terms. Yet access to justice is unequal in parts of our country. Suspects are sometimes arrested, tried and convicted without being adequately informed of their right to counsel. Even when he knows of this right, many a citizen cannot afford to exercise it. There are barely half enough Public Defenders, Legal Aid societies or other methods available to perfect this right.

In a publisher's note which accompanied the article, the following sentences speak eloquently of the interest and concern of our highest judicial officer:

> FORTUNE is proud to present this important estimate of the prospects of the law during the next quarter-century. The Chief Justice (like several other contributors to this series on America's "New Goals") is accepting no fee for his article. FORTUNE is therefore making an equivalent contribution to a cause that the Chief Justice cordially endorses, namely, the Legal Aid Society, whose offices are in New York City.

Other examples might be given, but there are not nearly enough of them.

Our judges strive mightily, each day in their courtrooms across the country, to achieve the American dream of justice under law. They are the first to tell us that adequate representation by competent counsel is an essential ingredient of the judicial process. Without the assistance of counsel, the rights written into our basic laws—to use the biblical phrase recently quoted by our Chief Justice—may become merely "sounding brass, and tinkling cymbals".

A well-planned defender service will provide, at small cost to the community, the experienced lawyers needed for those who cannot pay for a lawyer's help. The burden that such a service will lift from judicial shoulders cannot be overemphasized.

Help from our judges is the key to success in many places where Legal Aid civil offices and defender services are badly needed. Obviously the judges cannot do the job alone. But the community will respond to judicial leadership and the personnel required will swing into line. This is another way of saying: "We can't say 'No' to the Judge"!

The public relations benefits that will flow to Bench and Bar from a sound Legal Aid program are substantial and lasting.

If a substantial percentage of our leading citizens—judges, lawyers and laymen alike—will give a comparatively few hours of earnest effort to provide the simple machinery needed to fill in this gaping hole in our legal system—we can make America's dream come true—almost overnight.

---

4. Robert K. Bell, *Legal Aid in New Jersey*, 36 A.B.A.J. 355 (1950).
5. Arthur T. Vanderbilt, *An Experiment in The Trial of Indigent Criminal Cases*, 32 A.B.A.J. 434 (1946); Richard Hartshorne, *Equal Justice For All*, 37 A.B.A.J. 104 (1951).

A 1956 Sequel:

Law Office Organization

by **Reginald Heber Smith** · *of the Massachusetts Bar (Boston)*

■ Of all the articles the Journal has ever published, undoubtedly the most widely read appeared in four installments in 1940, written by Mr. Smith. The article was reprinted in pamphlet form under the title "Law Office Organization", and even today it is unusual for the Journal office to receive a batch of mail that does not contain several orders for this little book.

Now, more than fifteen years later, Mr. Smith surveys the legal profession with an experienced eye on its methods of office organization. His findings are sure to stir up a sizable reaction from the profession, much of it approving, much of it indignant.

■ When we are quite young, time seems to move on leaden feet and the next Christmas is an eternity away; when we are older, time outraces Mercury and the years slip by with incredible speed. Thus, when I dug out the articles I wrote for the JOURNAL "only a short while ago", it was a shock to find that they were published in 1940 (Volume 26, issues of May, page 393; June, page 494, July, page 610; and August, page 648).

In complying with the Editor-in-Chief's request for an article on this subject, I shall try to answer this question: "What has happened and what is now happening about better law office organization?"

We have more evidence than we used to have. In connection with the Survey of the Legal Profession, I have tried to find everything written anywhere on the subject. Even so, it is best to admit promptly that I am unable to give doctrinaire answers to my own question.

For those who believe that every law office *must* have some form of organization, the evidence falls into three piles: (1) interest in law office organization is increasing rapidly and is now widespread; (2) the lawyers in the United States remain overwhelmingly solo practitioners and refuse to budge; (3) the elusive notion, not too often expressed but continually apprehended, persists that there is an *antipathy* between the lawyer and any organization *for himself*.

The major purpose of this article is to collect and arrange the evidence with judicial impartiality into three piles. I shall venture my own interpretation—which is unimportant. What *is* important is that readers shall come to conclusions, formulate their reasons, and give others the benefit of their thoughts by talking at bar meetings and writing for legal periodicals.

PILE I. Interest in Law Office Organization Is Now Widespread

The above-mentioned four articles published in 1940 aroused enough interest to warrant their reprinting by the JOURNAL in a separate pamphlet which was sold for 50 cents per copy. (I had assigned all my interest in the articles to the JOURNAL.) This little pamphlet of 48 pages is now in its fifth edition and about 20,000 copies have been sold—chiefly to young lawyers entering practice.

In 1946 there took place something akin to a referendum on the subject. It happened in this way. Judge William L. Ransom was Editor-in-Chief of the JOURNAL which he was determined to make the greatest legal publication in the world. He decided to send out a questionnaire to ascertain what type of articles the readers preferred. His draft did not include law office organization simply because he did not consider it important. At my request he included it as Question No. 13 out of 16 questions. After 4,389 returns had come in they were tabulated.

Among the sixteen topics, "Law Office Organization" came in sixth. It received 2,757 affirmative votes, not far behind "Administrative Law" with 2,931 votes. The leaders were "Reviews of Supreme Court Decisions" and "Useful Articles" with, respectively, 3,755 and 3,560 votes.

Bar associations suddenly found that panel discussions on the subject attracted good audiences. Just about

the first was the American Bar Association Regional Meeting at Atlanta, March 7–10, 1951. The hero of the occasion was Paul Carrington, of Dallas, Texas, who demonstrated a complete grasp of the subject based on first-hand experience. Being a man of convictions, he has been willing to preach the gospel. (For example, look at his "How Some Lawyers Have Increased Their Law Office Income" in the February, 1954, issue of *New York State Bar Bulletin* at page 30, or "Increasing Law Office Income" in the July, 1954, issue of *Illinois Bar Journal* at page 808, or a reprint of the New York article in the April, 1954, issue of *Dicta* [at page 143] which is published by the Colorado and Denver Bar Associations.)

It has been my privilege to take part in about a dozen bar association panels. My partner, Grafton L. Wilson, who is assistant managing partner in our firm (which means that he knows more of the inside operations than I do) has spoken to the Maine, New Jersey and Vermont State Bar Associations.

That bar associations have been surprised by the lively interest in the topic can be summed up by the words of Frank X. Quinn, Chairman of the Committee on Professional Education of the Philadelphia Bar Association (*The Shingle* for May, 1951, at page 128):

> For the last several years, the Committee has considered the advisability of holding a one-day institute on "Law Office Management." This year it was "determined to try an experiment" and so such an institute was held on March 31, 1951, in the Ballroom of the Benjamin Franklin Hotel. The Committee was just as doubtful as it was in the fall of 1941, and just as needlessly so.
>
> The number of registrants was the highest ever, and the enthusiasm of the Bar was immense.

The Michigan State Bar held a session on December 10, 1951, on "How Properly To Run Your Law Office" with an opening discussion late in the afternoon and a six-man panel in the evening. The *Michigan State Bar Journal* for January, 1952, reports "a packed auditorium at The Detroit College of Law. Lawyers from large, small, and solo firms poured out of their offices to hear this [discussion]."

Law schools, as well as bar associations, have shown great interest and have conducted seminars or offered courses on the subject. For example, the University of Illinois College of Law had five sessions on November 26 and 27, 1954. The theme was:

> The effective management of a professional office and practice is as necessary as the effective operation of a business *if maximum service to clients is to be rendered.* [Italics supplied].

There is now a substantial literature about law office organization and management. Limiting ourselves to the more recent publications, we find that the American Law Institute in September, 1952, issued its 104-page booklet "Personal and Business Conduct in the Practice of Law" by Francis Price.

Volume I of *The Practical Lawyer* carried relevant articles in most of its issues during 1955, notably a series by Arch M. Cantrall on "A Law Office System" and an article by Paul A. Wolkin in the April, 1955, issue on "Bookkeeping for the Small Law Office".

The October, 1951, number of the AMERICAN BAR ASSOCIATION JOURNAL (Volume 37, page 729) published Eugene C. Gerhart's report to the Survey of the Legal Profession on "Organization for the Practice of Law: How Lawyers Conduct Their Practice".

The Student Lawyer Journal, which is the new publication of American Law Student Association, contains in its Volume I (1955) two articles on "Business Aspects of the Legal Profession" by F. Vern Lahart.

PILE II. Lawyers Remain Overwhelmingly Solo Practitioners and Refuse To Budge

Running through all the discussions and the literature have been two themes.

One has been that every lawyer, including the solo practitioner as well as the firm, must be more efficient in his accounting, filing and in the use of his time. How much improvement there has been in the conduct of the one-man office is impossible to say.

The other and more dominant theme has been that, as the law is entirely too vast to be encompassed by one man's mind, there is a necessity for group practice if the client is to be well served.

The President of the Illinois State Bar Association, Joseph H. Hinshaw, writing in the September, 1951, issue of the *Illinois Bar Journal* (Vol. 40, page 5) stated:

> With a few exceptions, the day of the lone eagle in law practice is fast fading away for practitioners determined to render substantial service to their clients, and desiring more than a bare living.
>
> Two or more men working in a law office can accomplish more than twice what either of them can accomplish alone. No one can know all the law, and even if he did he would not, alone, be able to read fast enough to keep up with the changes in more than one field. He would find himself behind the next day.

The American Bar Association's Special Committee on Specialization and Specialized Legal Education said in its 1954 report:

> A sizeable partnership offers members of the firm not only the opportunity to specialize but also the opportunity to be general all-around lawyers.
>
> Except in the case of the extraordinary individual or in the peculiar locality, the lawyer who wishes to be all things to all clients will do well to become a member of a firm rather than practice alone.
>
> Without pressing too hard the merits of practice in partnerships, it may be mentioned that comparatively large firms do not need to announce specialization. It is a fact that throughout the country, both in the large and the small cities, a firm of lawyers, generally speaking, gets to be known as competent or incompetent more rapidly and automatically than the individual practitioner. And it is almost universally assured that such a firm contains a lawyer proficient in almost every branch of the law.

"So You Want To Practice Law" is a vigorous article by Charles Belous, of the Jamaica, New York, Bar, that originally appeared in the

Queens Bar Bulletin of April, 1955, and has been condensed in *Case and Comment* of November-December, 1955. The author has specific proposals of which the last is (at page 7):

> There is one area wherein I think the bar association may be of particular use in helping to solve the economic problems of their professional members. In this day and age when new laws are turned out by the hundreds by the State and National Legislatures, the new principles of law enunciated by the thousands of courts and administrative agencies (quasi-judicial) as well as the hundreds of new *"executive"* orders, etc., the single practitioner, unless he becomes a "specialist", is fast becoming an anomaly. If one cherishes his independence and is also conscientious about his work, he will soon become a nervous wreck trying to keep up with this mass of *new* legal knowledge and information.
>
> The answer is, in my opinion, a law partnership or association of three or more lawyers in the form of a law firm. In this way they can pool their efforts and exchange their *"specialties"* and still keep the semblance of a general practice. I am convinced this is the answer.

The United States Department of Commerce published its "Incomes of Lawyers, 1929-48" in the August, 1948, issue of *Current Business*. Table 7 which correlated 1947 income with size of firm told the following dramatic story:

	Per Cent of Lawyers	Median Net Income (before Taxes)
Solo Practitioner	73.6	$4,275.
Firm of 2 Lawyers	14.8	6,500.
Firm of 3 "	4.9	9,477.
Firm of 4 "	2.1	12,500.
Firm of 5-8 "	3.4	16,833.
Firm of 9 or more Lawyers	1.3	21,500.

The accuracy of these figures has been challenged. I accept them as basically true because every other study of lawyers' incomes that I have been able to find tells precisely the same story. The figures as to Canadian lawyers obtained by the Dominion Bureau of Statistics can be found in *The Canadian Bar Review* for January, 1951 (Volume 29 at page 42). The figures for Chicago lawyers compiled by the University of Chicago School of Business are in the July-August, 1950, issue of *Illinois Law Review* (Volume 45 at page 311). For Colorado lawyers see *Dicta* for June, 1953 (Volume 30 at page 209).

What effect on the lawyers of the United States has been made by all these discussions, by the persuasive literature, and by the harsh economic realities?

Apparently none.

A fair test is whether proportionately fewer lawyers are practicing alone and more are practicing together in firms of at least two partners.

Martindale-Hubbell has prepared three statistical reports on the lawyers of the United States based upon their Law Directories of 1949, 1952, and 1955. The first two were prepared for the Survey of the Legal Profession; the third for American Bar Foundation.

The critical figures as between 1949 and 1955 are given in Table I.

An associate can be a lawyer employed by a firm or by a solo practitioner. As I believe an associate is more often an employee of a firm, it seems honest to consider the associates as lawyers in firms although not partners. Plainly this is correct if we are seeking the economic difference between group practice and solo practice.

The figures then are shown in Table II.

How can this riddle be explained?

Is there a deep-rooted almost ineradicable antipathy between the typical lawyer and the idea of *organizing* his law practice? Or can we avoid the problem by saying that all this is new to lawyers, they are conservative men and slow to move, and the discussions, the literature, the statistics are fairly recent?

Let us examine the latter question first because it can be subjected to much more objective testing.

Reginald Heber Smith has been a member of the Massachusetts Bar since 1914 and of the American Bar Association since 1918. A graduate of Harvard College and the Harvard Law School, he was until recently the managing partner of a large Boston firm. He has been active in bar association work for many years and was Director of the Survey of the Legal Profession. He was a member of the Board of Editors of the Journal for thirteen years.

PILE III.
There Is an Antipathy Between Lawyers and the Organization of Law Practice?

We are seeking to narrow the issue by trying to find out if the discussion of organization for efficient law practice has been going on, not for just a few years, but for quite a period of time. What is the evidence?

In 1921 the Illinois State Bar As-

Table I

Year	Solo Practitioners	Partners	Associates
1949	104,687	40,448	7,514
1955	127,389	51,668	10,366

Table II

Year	Partners plus "Associates"	Solo Practitioners	Total in Private Practice	Per Cent Solo
1949	47,962	104,687	152,649	68 +
1955	62,034	127,389	189,423	67 +

sociation at its annual meeting received the report of its Committee on Office Management—a brilliant document of thirty-two printed pages—which started out as follows:

> LAWYERS SUBJECT TO INDICTMENT
>
> After making a most careful and painstaking study of the subject of business systems in law offices, your committee reports that in its opinion lawyers generally are subject to indictment for criminally negligent management of their offices. Such an indictment would charge them with failure to install modern methods, systems and appliances; failure to respond to the demand for practical lawyers and practical methods; failure to transact their clients' business along business lines and to dispatch it as a business proposition; and failure to appreciate that they have a business of their own, distinct from that of their clients.

In 1933 a few figures about lawyers' earnings were obtained. They showed:

	Median Income
Solo Practitioner	$2,650.
Member of Law Firm	$6,490.

(These can be found in *A New York Survey* by Dean Paul Shipman Andrews of the College of Law of Syracuse University, published in 1940 at page 24.)

In 1936 the classic report of the New York County Lawyers' Association Committee on Professional Economics stated (at page 72):

> Recommendation B: Lawyers' Large-Scale Cooperative Offices for the Practice of Law:
>
> This is undoubtedly in the public interest, in view of the staggering expense pointed out in the record of the survey, and *the unfortunate tendency of so many lawyers* (also statistically observed)—*in their ignorance and helplessness—to duplicate their individual and limited office outfits ad infinitum.*

In 1938 Karl Llewellyn, who is listened to because he does not mince words, wrote in the 1938 Winter issue of *Law and Contemporary Problems* at page 133:

> Antiquated in organization, in methods of doing business, in methods of getting business, in nose for where services are needed, the bar finds its buggy crowded to the wall.

A forceful statement that the independent solo practitioner is the ideal for the profession can be found in Cheatham: *Cases and Materials on the Legal Profession* at page 13 where he quotes from A. M. Kvello's address in 31 *Reports South Dakota Bar Association* (1930) page 233:

> The Main Street lawyer is a distinct species in our land. As an individual member of the profession he glorifies in his independence and his individuality. He of all men has truly been a free agent. There never has been and there is not today any calling or profession that is more independent. But today the existence of that independent professional life is being threatened. I am but voicing a truism when I state that the economic world is practically being made over under our very eyes.
>
> Today, and I say it not in a boastful spirit, but in sober, conscious truth, the average Main Street lawyer is the principal guardian of the traditions of our profession and of the best there is in our civic and social life. He has been least affected by the back wash of this materialistic age. He has not been so directly or indirectly subsidized by the economic urge which is the dominant characteristic of this day. If there is any virtue in an individualistic and detached status in our profession then the Main Street lawyer is today largely the depository of that virtue.

This would sound like a description of Abraham Lincoln until we recall that he always liked to practice in partnership. His first partner was John T. Stuart, his next Stephen T. Logan and, when that broke up, he formed the lifelong partnership of Lincoln and Herndon.

Individualism looks differently to different men. Professor Willard Hurst of the University of Wisconsin Law School in *A History of the Principal Agencies of Law in the United States* at page 421 calls lawyers:

> The most unthinkingly and stubbornly individualistic members of the loosely organized American society.

Mr. Justice Brandeis, before his appointment to the Supreme Court by President Wilson, practiced law in Boston for many years. He believed in the partnership form. One of his partners, Edward F. McClennen, shortly before his own death wrote an article about Mr. Brandeis which was published in the September, 1948, issue of the *Massachusetts Law Quarterly*, Volume 33. In a letter dated August 19, 1896, Mr. Brandeis wrote:

> Much previous thought has led me to these conclusions:
>
> First: The organization of large offices is becoming more and more a business—and hence also a professional necessity,—if properly planned and administered—it must result in the greatest efficiency to clients and the greatest success to the individual members both pecuniarily and in reputation.
>
> Second: In such an organization the place of each man must be found—not prescribed. The advantage of the large field is that every man has the opportunity of trying himself at everything and anything—and by a natural law comes to do those things that on the whole he does most effectively.

All this historical evidence, which is buttressed by many talks with many lawyers, constrains me to believe that there *is* an antipathy between the typical or average American lawyer and the idea of organization for the practice of law.

For that reason in speaking at the Columbia University Bicentennial symposium, on "The Influence of the Metropolis on the Professions" to an audience composed of laymen as well as lawyers, I defined the key terms in these words:

> The lawyer who works alone is called a "solo" practitioner and the word carries no derogatory implication. On the other hand, a group of lawyers must have a group of offices and that is called a "law factory" which certainly is intended to be not only derogatory but damning.

Then I ventured to add:

> If my elementary Latin is correct, a factory is a place that makes things. The "law factory" makes such things as wills and contracts; also it makes many things possible; finally it often makes peace.

To round out the record it is desirable to blow to smithereens the common assumption that law firms or "law factories" are typical of practice in the big Eastern cities such as Wall Street in New York or State Street in Boston.

(Continued on page 192)

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in-Chief*.....Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in-Chief*....Chicago, Ill.

BOARD OF EDITORS

GEORGE ROSSMAN .....Salem, Ore.
RICHARD BENTLEY .....Chicago, Ill.
EUGENE C. GERHART.....Binghamton, N. Y.
ROY E. WILLY.....Sioux Falls, S. Dak.
E. J. DIMOCK.....New York, N. Y.
DAVID F. MAXWELL.....Philadelphia, Pa.
ALFRED J. SCHWEPPE.....Seattle, Wash.
E. SMYTHE GAMBRELL, *President of the Association* .....
..... Atlanta, Georgia
JOHN D. RANDALL, *Chairman, House of Delegates*.....
..... Cedar Rapids, Ia.
HAROLD H. BREDELL, *Treasurer of the Association* .....
..... Indianapolis, Ind.

General Subscription price for nonmembers, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
Members of the American Law Student Association, $1.50 a year.

EDITORIAL OFFICES

1155 East 60th Street .....Chicago 37, Ill.

■ 70,000 Extra Copies

As part of the current campaign for enlarging the membership of the American Bar Association, this issue of the JOURNAL is going to some 70,000 lawyers who are not members of the Association nor regular subscribers to the JOURNAL. We extend our greetings to this large group of new readers and suggest to them, first, that this issue is a typical number of the AMERICAN BAR ASSOCIATION JOURNAL as it has been published for many years, designed to represent the Association and to bring to the notice of the American Bar the major activities of the profession and the developments of the law within the United States as a whole and on the world scene of which we are an integral part; and, second, that the American Bar Association is representative of the entire organized Bar of the United States, including as it does in its governing body, the House of Delegates, representatives from all state bar associations and of many important city bar associations in the country. By virtue of that fact and of its influence, present and potential, it is an organization to which every lawyer in the United States ought to belong.

■ Courthouse Lawyers

It is strange that the expression "dirt farmer" should convey an impression, but it does. Rightly or wrongly we are accustomed to believe that there are a lot of "agricultural experts" who have much to learn from men who are not at a loss when the power for the milking machine is cut off by an ice storm. Just so we mean something when we speak of "courthouse lawyers". All lawyers are ministers of justice and the courthouse is their temple, yet in every community there is a group of them who qualify for a description that identifies them with it. They are not necessarily the great trial lawyers who descend upon the courthouse with a retinue of brief-case carriers when a case which warrants a big fee is to be tried. They are the lawyers who happen to be on hand when the judge has to have counsel to represent without compensation an indigent defendant in a criminal case. They are the lawyers who know where to look in the Registry of Deeds for the index of U. S. Loan Mortgages, who call the clerks in the county treasurer's office by their first names and who can give the right steer to an unfortunate who comes into the building and hesitatingly asks how to go on relief. They know how to try a $500 case like a $500 case so that the compensation that their client can pay them is adequate pay for the time consumed. They are always on hand on the first day of the term and always have a few matters on the calendar. They know how to use printed forms and can make a profit on a fee allowed for representing a bankrupt that would just about pay the typewriting bill of anyone but a courthouse lawyer. They rarely ask long delays to permit the preparation of briefs but are more likely to whip out a commonplace book and ask the court to make a note of some case that has stood them in good stead in a similar situation. They do not scorn the lowly office of notary public and cheerfully acquiesce when buttonholed by fellow practitioners in the hall with requests to take affidavits and acknowledgments.

It is in their cases that the law is made. Rarely do they have litigation with so much at stake as to warrant the expense of air-tight preparation. Of course they do not deliberately try to see how close to the wind they can sail in preparation but often they have to limit it to what the case can stand. Those are the cases where the line is pricked out between the short cuts and expedients that will meet the requirements of law and those that will not.

The courthouse lawyer is more likely to be on the minimum fee schedule committee or the annual picnic committee of the bar association than the committee on constitutional law. His clientele is more noteworthy for its size than for its wealth. Those in the community who do not call him "Bill" refer to him as "Lawyer Jones".

In spite of everything, or perhaps because of everything, it is the journeyman courthouse lawyer who

furnishes the strongest link between the two classes of officers of the court—the judges and the lawyers. Without him the administration of justice would tend to become dry, academic and impersonal. May this backbone of the profession continue to fulfill its great function in the body of the Bar.

■ Capital Punishment

At a recent hearing conducted by an investigating subcommittee of the United States Senate, Senator Price Daniel, Democrat of Texas, is reported to have announced his intention of urging the full Judiciary Committee to recommend the death penalty for narcotics smugglers and some peddlers.

Such a recommendation, if adopted, would be sure to fan the flame of the controversy which is presently raging on this issue from coast to coast. It would certainly explode a bombshell among those humanitarians advocating the elimination of capital punishment even in homicide cases. To them capital punishment does not and cannot deter crime. Obviously the Senator does not share their point of view. In any event Senator Daniel's statement does point up the necessity for taking another look at the whole problem in the light of the changing social conditions of this atomic age and the increased lawlessness which has followed in the wake of two and a half world wars.

Quite timely, therefore, is the scholarly and interesting essay "Capital Punishment" by Judge Evelle J. Younger, appearing elsewhere in this issue. The Judge presents a veritable treasure-mine of exotic lore on capital punishment and covers completely both sides of the subject. He concludes that the whole problem revolves around the answer to what he calls "the $64 question": "Is capital punishment the most effective deterrent?".

Whether the reader is an idealist who feels that capital punishment today is a barbarous anachronism or is a realist who believes that the only effective way to treat with the wolves of society is to exterminate them, Judge Younger's article will prove inspiring reading.

The JOURNAL joins Judge Younger in recommending that the American Bar Association's Committee on the Administration of Criminal Justice give further study to the problem at this time.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

Hartford, Connecticut	April 15-18, 1956
Spokane, Washington	May 31—June 1 and 2, 1956
Baltimore, Maryland	November 1-3, 1956

States Included

HARTFORD — (Northeastern Regional Meeting)—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont (Cyril Coleman, General Chairman, 750 Main Street, Hartford 3). (Headquarters—Statler Hotel)
(For information and reservations, write to the chairman listed above)

MID-YEAR MEETING

CHICAGO, ILLINOIS (Edgewater Beach Hotel) — February 16-21, 1956

BOARD OF GOVERNORS MEETING

CHICAGO, ILLINOIS (Hotel Windermere) — May 21 and 22, 1956

ANNUAL MEETING

DALLAS, TEXAS — August 27-31, 1956

Books for Lawyers

A GOODLY HERITAGE. *By Ella Chalfant. Pittsburgh: University of Pittsburgh Press. 1955. $3.00. Pages xiii, 239.*

John Bredy died testate apparently a resident of Allegheny County, Pennsylvania, some time prior to March 31, 1789, the date on which his last will and Allegheny County's first will of record was recorded. His will shows us the apprehension under which the midwestern pioneers lived by telling first of a prospective journey from the mouth of the Yough River to post Vinston on the Wabash and then of John's true motive for drawing his will: "... if I Should Die or be Killed by the Indians before I Come Back. . . ."

Ella Chalfant has written an unusual book of pioneer history since in great part she lets the Pittsburgh frontiersmen speak for themselves. She has selected wills such as that of John Bredy from the first three of the Allegheny County Will Books, to tell the story of the pioneers' hopes, fears, loves, successes and even hates. Few readers will doubt that "What matter [ed] most got into [the] will."

A Goodly Heritage is not, however, a mere compilation of aged and dusty, although interesting, and at times amusing, testamentary documents. The author sought and found the personal histories and in certain instances posthumous newspaper references of and to the testators about whom she writes. It is by reason of her thorough research that we can understand the experience of frustration causing one Adamson Tannehill to direct by will that his tombstone have carved in it for all to see:

> Farewell, vain world I've seen enough of thee
> And am now careless what thou says't of me.
> Thy smiles I court not, nor thy frown I fear;
> My cares are past, my head lies quiet here.
>
> What faults you saw in *me*, take care to shun
> And look at home, enough there's to be done.
> False swearing and vile slander can't reach me here—
> Of each, when living I had my share.

Adamson, we are told, was removed from the office of justice of the peace in 1798, having been convicted of extortion. Later reinstated, he never overcame the feeling of bitterness toward his accusers which his will reflects.

The reader cannot help but better understand the impact of slavery and apprenticeship on this frontier ("Also, at my death, I give to Elinor . . . her liberty"), of whisky on the economy ("I desire that my still and twenty gallons of whiskey . . . be sold to the best advantage"), of women's dependence on their spouses' whims for the right to property ("To my dear and loving wife . . . all her wearing apparel to use during her life and dispose of at her death according to her pleasure."), of the opportunity for education or lack thereof on a father's hopes for his children ("I allow them to be kept in school until they can read and write and go through the five common rules of arithmetic with a tolerable degree of proficiency"), and of religion on man's thinking ("I give and commend my soul to the hands of God that gave it . . .").

The author's obvious purpose, to add a work of value to the study of the history of Western Pennsylvania by use of the earliest wills on an American frontier "made possible through a grant-in-aid from The Buhl Foundation of Pittsburgh" is expertly accomplished. It is interesting to speculate as to the value of instruments containing marital and residual trusts to Ella Chalfant's successors in research one or two hundred years hence.

JOSEPH R. JULIN
Chicago, Illinois

RECENT CASES AND MATERIALS IN BUSINESS LAW. *By Claude W. Stimson and Joseph Lazar. Boston: Houghton Mifflin Company. Cambridge: The Riverside Press. 1955. $3.50. Pages 347.*

This attractively paper-bound casebook, with extra large two-column pages, is principally designed for first-year students of business law.

There are eight chapters: "Contracts", "Agency", "Personal Property", "Sales", "Negotiable Instruments", "Partnerships", "Corporations", and "Real Property". In addition it contains a table of contents, a table of cases, a page of words and phrases, an index, and a unique section outlining and illustrating the standard method of abstracting a case.

In general the cases have grown out of present-day situations and hence present problems familiar to many readers. Although the problems are contemporary, the opinions restate long-established principles of law of value to every businessman.

Since many court proceedings involve more than one field of law, cases were selected which show such interrelations. Thus a simple case may contain problems in contracts, sales, agency and perhaps other fields.

Introductory case notes and comprehensive text notes—many of which contain classic statements of fundamental legal principles from older cases—make this book appropriate for use as the basic work, or as complementary to the basis work, in beginning courses. It may also find a place as a supplement to the

textbooks in advanced courses. It will prove valuable for review and summarization, and as an aid in preparing for the law section of qualifying examinations for certified public accountants.

BENJAMIN WHAM

Chicago, Illinois

THE GUILTY MIND. *By John Biggs, Jr. New York: Harcourt, Brace & Co. 1955. $4.50. Pages 236.*

Scholarly, yet lively, is *The Guilty Mind,* a book about psychiatry and the law of homicide. The author is Chief Judge John Biggs, Jr., of the United States Court of Appeals for the Third Circuit.

Reaching back to earliest times, the opening chapters trace the recognition of mental illness and the developing attitudes of the law. There follows a detailed discussion of the English and American law relating to homicide, with particular reference to the growth of the principle of "guilty mind", or *mens rea,* and the standard of responsibility applied to the insane.

If the issue in a trial was whether someone had typhoid, and the judge should tell the pathologist as a matter of law that in answering he must not consider the laboratory tests, but only one symptom, temperature, which he solemnly declared legally conclusive, no one would defend such an instruction. The fact that in ancient days diagnoses had to rest on the single symptom, temperature, would not be permitted to hobble a witness in a modern legal proceeding. He would be allowed to consider any evidence scientifically pertinent and he would be granted full opportunity to explain his conclusions.

Yet the *McNaghten* rule formulated in England in 1843 still haunts the law. Its test of criminal responsibility is whether the accused knew the nature and quality of his act and the differences between right and wrong. It freezes into the law as an immutable principle the state of psychiatric knowledge of a bygone day.

While tenaciously adhering to the right-wrong test, judges and juries here and in England have actually evaded or juggled the law. Justice Frankfurter is among those who have denounced the *McNaghten* rule as a sham, and before him Justice Cardozo said that we "mock ourselves with a definition that palters with reality".

The intervening years since *McNaghten* have brought abundant confirmation that responsibility implies reasonable integration of the total personality. This includes the emotions as well as the intellect. Medical science teaches that the mind cannot be split into watertight, unrelated, autonomously functioning compartments like knowing, willing and feeling.

Judge Biggs himself unavailingly protested (*United States* ex rel. *Smith* v. *Baldi,* 192 F. 2d 540) the rule which focuses upon capacity to know right from wrong to the exclusion of all other factors.

In 1954, however, in the *Durham* case, the Court of Appeals for the District of Columbia Circuit handed down a notable opinion by Judge Bazelon, in which he was joined by Judges Edgerton and Washington, and the nine-judge bench declined to review the decision. The standard established is simply whether the unlawful act was the product of mental disease or mental defect, without limitation to the cognitive faculty alone.

While few defend the *McNaghten* rule, some are concerned that *Durham* fails to provide a substitute formula. The merit of *Durham,* however, is that it does not attempt to embody one set of medical theories in place of another. The whole point is not to restrict the test to particular symptoms, but to permit inquiry as broad as necessary under accepted scientific criteria.

To lawyers it is a commonplace that there are no specific definitions of fraud or negligence, yet these concepts are applied in courts every day intelligently and with reasonably satisfactory results. We recognize that fixed verbal formulae, however ingenious, would create only the illusion of certitude.

The American Law Institute has formulated alternative proposals for determining legal responsibility of the mentally ill. The differences between the alternatives are less important than the recognition common to them and to the *Durham* opinion, that not an unbending and artificially restrictive rule, but enlightened determination upon all relevant factors should be the aim.

Much of the reluctance to abandon *McNaghten* doubtless stems from the fear that if the criteria are broadened, instances may multiply of violators escaping punishment and being released after a brief detention in a mental institution. The court in *Durham* was not unmindful of the apprehension. It pointed out that an accused acquitted by reason of insanity is presumed insane and may be "confined as long as the public safety and his welfare require". This is also the insistence of the American Law Institute proposals.

By directing people's minds to the problem, Judge Biggs's work can exert an important influence upon the future of the law. While carefully accurate, he happily avoids the tiresome technical lingo of both the legal and medical professions. It should interest a far wider group than lawyers and doctors who come in direct contact with the problem of mental illness of persons accused of crime. It should appeal no less to all who are intelligently concerned for the effectiveness of our courts and medical institutions in an area touching one of the most important and elusive of our social problems.

SIMON E. SOBELOFF

Office of the Solicitor General
Washington, D. C.

FORGERY AND FICTITIOUS CHECKS. *By Julius L. Sternitzky. Springfield, Illinois: Charles C. Thomas. 1955. Price $4.75. Pages 101.*

The author, a retired inspector of the Oakland Police Department and former head of the Forgery and Check Detail, has prepared an interesting but none too profound book

on the problem of fraudulent checks. For one who is interested in learning how check passers operate, the case histories presented give a good insight into successful techniques. For one desiring to learn how to keep from cashing bad checks, there is in this small monograph some good basic advice. It has, however, little to recommend it to the lawyer, experienced criminal investigator, or document examiner.

Inspector Sternitzky undoubtedly could have written a much more useful book, especially if he had expanded in a comprehensive manner the methods that might be used in establishing the validity of checks and the methods used in identifying the individual who is passing the check. These are the two basic steps that he suggests each person take before cashing a check, but he has little to say beyond these suggestions. Many potential readers, the shopkeepers, bank clerks, or the man on the street, could profit by further suggestions on these subjects.

The book has a number of weaknesses which should be noted briefly. It is a text most useful to people in California since only California laws are cited and only California clearing house numbers are noted. Since, according to the author, many checks, the forms of which have been fraudulently printed, contained the wrong clearing house numbers, an appendix setting forth all the numbers used by the Federal Reserve Bank system would be of value.

The author assumes that the man on the street can compare the endorsement and the signature of the maker and determine that both were written by the same person despite the use of disguise in one or the other signature. This is a big order since many times a well-qualified document examiner cannot himself express an opinion based on the two signatures alone.

From reading this text it is quite clear that the author is much better qualified as an investigator of fraudulent checks than he is as a handwriting examiner. His statement that the most common type of handwriting is Spencerian (page 64) is either a misuse of the term, Spencerian, or an indication of little knowledge of American handwriting systems. The Spencerian system has not been taught in American schools since about 1890. Today there are few writers who learned this system (most would be well past seventy-five). Other discussions involving handwriting identification show weaknesses and misstatements.

The book would have been improved by omission of the chapter on inks. The correct information in the chapter makes little contribution to the subject, and there are several erroneous statements. The most serious is that any ink placed on the paper with a heavy stroke and allowed to dry without blotting would be "practically impossible to obliterate". This is hardly the fact. Many dye inks could be readily removed with ink eradicator.

The book could be improved by editing, but it is of value even in its present form as a warning against the fraudulent check passers. For this purpose, however, a condensation to a thirty-five to fifty page pamphlet priced at a dollar or less so as to give wide distribution to the general public would be more effective.

ORDWAY HILTON
New York, New York

THE PRIVATE DIARY OF A PUBLIC SERVANT. *By Martin Merson. New York: The Macmillan Company. 1955. $3.00. Pages 171.*

This is a contemporaneous chronicle of one private citizen's brief foray into the public service. He emerged, by his own admission, with his head both bloody and bowed. His sojourn in Washington happened to coincide with that curious period when the reputation of the United States was smudged a bit by the smoke of burning books. And he was sitting squarely on top of the bonfire as the *alter ego* of the Director of the International Information Service, then the agency of the Department of State charged with the responsibility of communication—the illumination of the bright face of America to the world, the immensely more subtle and difficult task of conveying its spirit to peoples bred in other and older cultures.

This was the time when the season's most distinguished commencement speaker earnestly adjured his fresh-faced listeners not to join the book-burners, with neither the exhorted nor the exhorter apparently being aware of the fact that no one had been burning any books recently except the Government to which each owed allegiance and over which the one had, to put it modestly, a considerable measure of authority. This was the time when even these homilies were shortly watered down by the suggestion that they applied to American libraries at home and not to those maintained abroad—a geographical double standard for literary censorship and suppression. This was the time of true constitutional crisis, when executive timorousness threatened the separation of powers upon which the Founders had set such great store.

From the vantage point of today, when the balance has largely righted itself once more, presumably the author can join the rest of us in looking back upon this period with greater equanimity than is reflected in the day-to-day recordings of multiple frustration and deepening disillusionment of which this book consists. The anguished tone of these daily jottings speaks well of the sensitivities of the author's conscience and of his instincts for decency and fairness. (Even at the end of his stay, however, he was not above suggesting, in a letter to his principal congressional scourge, a double standard of his own for investigative activities, geared to the circumstance of who happened to be in office at the moment). It is less eloquent in terms of his personal maturity, his understanding of the fact that government and public life are—like most other human activi-

ties, such as practicing law or teaching school or running a general store—full of difficult people and difficult problems which do not yield easily to the touch of the gifted amateur who deigns to grace them for a few fleeting moments.

This naïveté shows up quickly. The very first entry in the log recounts how, when asked to go to Washington early in 1953, the author's initial impulse was to say no. But then, he relates, he asked himself how, in good conscience and despite the personal financial sacrifices involved, he could justify failing to give a hand to the Government he had worked so hard to elect. These thoughts caused him to emit what is surely one of the most thundering, albeit unintended, anticlimactical statements of all time: "I'll do it. But I can't stay more than *thirty days.*"

The stay in fact amounted to five months, a short enough time in itself but long enough, it would seem, to bring home the realization that the intricate business of governing 160 millions of people does not respond automatically to the thirty-day treatment. It was long enough to find, apparently to his surprise, that there were upright and talented public servants who had been working away there long before he came and who would still be on the job long after he had gone—devoting whole lifetimes to careers pursued continuously under successive administrations of changing political complexion. These, of course, are the people who can't indulge the luxury of publishing the frustrations and irritations of each working day. They know that only he who runs may write.

CARL MCGOWAN

Chicago, Illinois

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1953. *Issued under the auspices of the Royal Institute of International Affairs. Oxford University Press. 1954. $12.00. Pages 591.*

If memory serves this reviewer right, Stephen Leacock once devoted page one of a book to a hair-raising description of a turbulent night at sea—and then, on page two, "reversed his field" by saying in effect: "But that wild night has nothing to do with this story, the scene of which is laid in quiet, pastoral surroundings".

Point one of this review must state, as other reviewers have said of prior issues (this is the thirtieth year of issue), that this annual year book is a "treasure of instruction" in international law; that it is in form quite like the great American quarterly in the field, *The American Journal of International Law;* that it contains thirteen articles and six notes, all carefully documented, sixteen abstracts of English court decisions in 1952-53 involving questions of international law and seventeen book reviews; and that it should be in every substantial law library.

But, as in Stephen Leacock's book, that has nothing to do with the theme of this review—which is that members of the American Bar who have regarded "international law" in the same light as "Philosophy 4" would find such collections as this of surprisingly lively interest and current importance. Whether as precedents, as analogies, or as of possible use in connection with cases involving aliens in this country or American citizens or investments abroad (the number of which is growing by leaps and bounds), the well-written materials on international marriage and divorce, on the enforcement of taxes against aliens, on plural nationality and citizenship, and the like, are of real interest to the practitioner in this country.

To the lawyer who has been formulating his own views on such subjects as Senator Bricker's proposals for amending the Constitution, the scope of diplomatic immunities, jurisdiction of foreign countries over American Servicemen who allegedly commit crimes abroad, or the international character of the United Nations Secretariat, articles or abstracts in this collection would be of special interest. To a lawyer who tries to influence the views of others on such subjects, reading of this sort should be a must.

Above and beyond all this, these articles open new vistas on the work of the International Court of Justice, the legal character of international agreements, international arbitral tribunals, the laws of war, the significance of the device known as the "diplomatic protest", and the implications of the requirement of ratification of treaties.

If the reader will permit his eyes to be opened to some of the conflicts-upon-conflicts with which our State Department must deal in this evermore-complicated world of ours, he may here read "up" on the extent to which international law applies within the British Commonwealth or on the conflicts that arise from overlapping regional treaties or from an amendment to a multipartite treaty which is not executed by all the original signatories.

The fact of America's position of world leadership is unfortunately far better recognized than the fact that such leadership, to be effective, requires American lawyers to acquire some understanding of foreign law and international law, both public and private. A good start in that direction would be to own, to browse in, and to read such collections as this.

LYMAN M. TONDEL, JR.

New York, New York

THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW. *By J. M. Holden. University of London; distributed by John de Graff, Inc., New York. 1955. $7.00. Pages 350.*

The author, J. Milnes Holden, LL.B., Ph.D., A.I.B., is a Barrister at Law of Lincoln's Inn. The work was prepared and written under the auspices of the University of London, Institute of Advanced Legal Studies, and is the result of some six years of research and study by the author, which is well illustrated by the detail and historic references found throughout the text and footnotes.

Bills, promissory notes, checks and other forms of negotiable paper are probably used more in everyday business dealings by the public and hence are likewise on the average lawyer's desk in some form or other daily more than any other legal forms. Unless some specific legal problem arises, negotiable paper is accepted as a matter of course, the rules governing are likewise known and accepted. We American lawyers rarely give thought to the question of how, when and under what circumstances the different types of negotiable instruments now known and accepted by the public and lawyers received their start and how they developed into the forms that we use today and which are used in the English-speaking world generally.

Dr. Holden's book, as indicated by the title, successfully traces the history and development of the common forms of negotiable paper used in England and which have generally spread over the common law world, such as bills of exchange, promissory notes, checks, and most other forms of negotiable paper. This work fills a long felt need of the common law world by tracing the historical background and the step by step development of negotiable paper. In telling his story, he relies partly on historical documents and source material, partly on judicial interpretation of the Law Merchant or custom among merchants, partly by the continuing course of the common law through changing and modifying court decisions, partly through various statutes affecting negotiable paper. Interspersed throughout the work at relevant points are historic or economic factors which influenced the development of the various types of negotiable instruments now used or that were used and have since fallen into disuse and oblivion.

An extremely interesting chapter opens the discussion of the entire subject by giving a history of writings obligatory in England, commencing approximately in the thirteenth century, citing early cases as examples of the existence of embryonic negotiable paper. This attempt to establish something akin to negotiable paper was the result of practices among merchants who attended the various fairs held in the Middle Ages in England.

Dr. Holden likewise brings forth an interesting sidelight in that he explains the early conflict for jurisdiction over the subject matter between the different courts which sought to control litigation arising out of negotiable paper; how the admiralty courts retained jurisdiction generally until Coke's time, when the common law courts under Coke acquired more or less exclusive jurisdiction.

The author has handled his general subject by treating the development of bills of exchange separately from promissory notes. He has also broken down the entire subject of negotiable instruments arbitrarily into four periods of growth, that prior to 1710, from 1710 to 1788, from 1788 to 1882, the year the Bill of Exchange Act was passed by Parliament, and lastly from 1882 to the present time. It may be noted that this act was the forerunner and model of our own Uniform Negotiable Instruments Act and the first codification of the common law on the subject notwithstanding the earlier passage of many statutes dealing with various phases of the subject. The author traces the development from the original embryo through its various vicissitudes of public use and acceptance, its treatment by the courts, and the impact of historical crises on negotiable paper. For example, during the reign of Charles II, Charles raided the gold stored by merchants in the Tower of London causing them thereafter to deposit their funds with the goldsmiths who, in turn, issued notes for the deposits, paid interest to the depositors, and loaned money at interest to others. Thus we see the start of modern banking and the general use of promissory notes.

The author at all times wherever gives proper cross references from his principal subject of bills of exchange or promissory notes to similar development in the companion field, so that the reader receives a fairly general contemporaneous and chronological story.

A necessary part of the history of the growth of negotiable paper is the history of banks and banking, and particularly the part played by the Bank of England. As this is related by the author, it makes for extremely interesting reading and throws a light on the historical background of that which is regarded by us as commonplace today.

The subject of checks is treated separately. It was not until 1860 that a check was held by the English courts to be a negotiable instrument. A special chapter is devoted to miscellaneous types of negotiable paper. Lastly there is a general discussion of modern trends in the types of negotiable paper and the present day use of the older types, including comment to the effect that in England Bills of Exchange have fallen into disuse as a result of the increased use of checks.

This work should be a must for every American lawyer as it is a really substantial contribution to the better understanding of the historical background of negotiable instruments. After reading this book, when a note, draft, check or other negotiable instrument is involved, it will immediately bring to mind the turbulent growing pains over the centuries that the product on your desk has had in order to attain its present form, with all of the rules of law governing. For another reason this volume should at this time have great appeal for the American lawyer. It fits well into an understanding of the changes proposed in our present law by the recently completed Uniform Commercial Code which on our side of the Atlantic will have much the same effect as the Bills of Exchange Act of 1882 had in England at that time. It attempts a modern codification of the customs of merchants, bankers and others with a re-codification of the statute and court made law.

MARTIN J. DINKELSPIEL
San Francisco, California

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Criminal Law . . .
timeliness of objections to grand jury

■ *Reece* v. *Georgia*, 350 U.S. 85, 100 L. ed. (Advance p. 109), 76 S. Ct. 167, 24 U. S. Law Week 4025. (No. 112, decided December 5, 1955.) *On writ of certiorari to the Supreme Court of Georgia. Judgment reversed.*

The Supreme Court here reversed the conviction for rape of a semi-literate Negro because of an alleged systematic exclusion of Negroes from the grand jury that indicted him. The Court's holding was confined to the question of the defendant's failure to raise his objections to the grand jury prior to indictment as required by Georgia law.

Reece was arrested for the rape of a white woman on October 20, 1953, and was held in the county jail until he was indicted three days later. The court appointed counsel for him on the day following his indictment. On October 30, Reece moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury. This motion was overruled and on the same day he was tried, convicted and sentenced to be electrocuted. The Georgia Supreme Court held that the motion to quash was properly denied because objections to a grand jury must be made before an indictment is returned, but reversed the conviction on other grounds. Reece was retried and again was convicted. It is this conviction that was before the United States Supreme Court.

The Court's opinion was delivered by Mr. Justice CLARK. Declaring that the right to object to a grand jury presupposes an opportunity to exercise the right, the Court declared that it was "utterly unrealistic" to say the Reece, "a semi-literate Negro of low mentality", had an opportunity to object to the grand jury without the assistance of counsel. To deny him this opportunity was a denial of due process. Valid grand jury selection is a right protected by the equal protection clause of the Fourteenth Amendment, the Court observed, and it had no trouble finding the evidence sufficient to support the allegation of systematic exclusion of Negroes from the grand jury.

The case was argued by Daniel Duke for the petitioner.

Criminal law . . .
probation

■ *Affronti* v. *United States*, 350 U. S. 79, 100 L. ed. (Advance p. 105), 76 S. Ct. 171, 24 U. S. Law Week 4031. (No. 71, decided December 5, 1955.) *On writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Judgment affirmed.*

This case settled the question of the power of a federal district court to grant probation after a convict has begun to serve the first of a series of consecutive sentences.

Affronti was convicted on nine out of ten counts charging him with illegal sale of narcotics. A five-year sentence was imposed for each count, execution of the sentences on counts six through ten was suspended and probation granted, the probation to begin at the expiration of the sentences on counts two through five. While he was still serving the sentence on count two, Affronti sought suspension of the sentence and award of probation on counts three, four and five. The district court denied his motion and the Court of Appeals affirmed.

The judgment of the lower courts was affirmed by the Supreme Court, speaking through Mr. Justice REED. The Court reasoned that it was unlikely that Congress intended to make probation available at the same time that parole and executive clemency were available, citing its decision in *United States* v. *Murray*, 275 U. S. 347. In that case, the Court had decided that a district judge had no power to place a convict on probation after he had begun the execution of his sentence. The Court admitted that the statutory language was not plain, but held that probationary power ceases immediately upon imprisonment for any part of the cumulative sentence, saying this interpretation avoided "interference with the parole and clemency powers vested in the Executive Branch".

The case was argued by Harry F. Murphy for petitioner and by John V. Lindsay for the United States.

Criminal law . . .
objections to composition of grand jury

■ *Michel* v. *Louisiana, Poret and Labat* v. *Louisiana*, 350 U. S. 91, 100 L. ed. (Advance p. 114), 76 S. Ct. 158, 24 U. S. Law Week 4027. (Nos. 32 and 36, decided December 5, 1955.) *On writs of certiorari to the Supreme Court of Louisiana. Judgments affirmed.*

These cases raised again the perennial question of a defendant's right to raise a federal question after the state's procedural rules have made it untimely.

The petitioners, all Negroes sentenced to death for aggravated rape, made no attack on the composition of the petit jury or the fairness of their trials, but did challenge the composition of the grand jury which indicted them, alleging a systematic exclusion of Negroes from the panels. In each case, the objection to

Reviews in this issue by Rowland L. Young

the grand jury was raised after the expiration of the term allowed for raising such objections by the state's Criminal Code. The state courts had ruled that the question of exclusion of Negroes from the grand jury had been waived.

Mr. Justice CLARK, speaking for the Supreme Court, declared that the test was whether the defendant has had "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the State court". He then examined the facts of each case to see if this test were met.

In Michel's case, the defendant was arraigned on March 2, the day the term of the grand jury expired. Michel appeared without counsel and the court asked a lawyer present to act for him. The lawyer requested and was granted a continuance of one week. On March 5, the lawyer was formally notified of his appointment as Michel's defense counsel, and on March 6, a co-counsel was appointed. On March 9, Michel filed his motion to quash the indictment on the ground that Negroes were excluded from the grand jury. The state demurred on the ground that the motion came too late. The state criminal code requires such an objection to be raised before the expiration of the third day following the end of a grand jury's term or before trial, whichever is earlier. The Supreme Court declared that the result of this case, therefore, hinged upon the precise date of appointment of counsel for Michel, his counsel contending that he was not aware that he was to be counsel until March 7, and that even if he assumed that he was appointed on March 2, he was unfamiliar with the case and thought that the week's continuance held open for that period all of petitioner's rights. The Court refused to accept this argument, however, since both the trial court and the state supreme court had explicitly found that counsel was appointed on March 2. "On a question of state practice with which we are unfamiliar, we will not ordinarily overturn the findings of two courts on the mere assertion of counsel that he did not consider himself appointed on the date of record" the Court declared.

One of the defendants in No. 36, Poret, eluded the police and fled from Louisiana shortly after the crime was committed. He was indicted on December 11, 1950, but his whereabouts were unknown until 1951 when Louisiana authorities discovered that he was in prison in Tennessee. He was returned to Louisiana after he had served his term in Tennessee, was arraigned on October 27, 1952; on November 7, he moved to quash the indictment because of the systematic exclusion of Negroes from the grand jury. The trial court denied the motion on the ground that it was a year and a half too late, declaring that the provisions of the Criminal Code could not be suspended for the benefit of a fugitive from justice whose own conduct prevented him from asserting his rights.

In affirming, the Supreme Court pointed out that Poret's flight was itself a violation of federal law. The opinion declared that the fugitive status did not excuse "failure to resort to Louisiana's established statutory procedure".

As for Labat, Poret's codefendant, he was indicted on December 11, 1950, and arraigned on January 3, 1951. On January 5, the court appointed counsel. The status of the case then remained unchanged for more than a year. In October, the codefendant Poret was returned to the state and Labat's motion to quash the indictment was filed on November 7, nearly two years after the expiration of the term of the grand jury that indicted him.

In affirming this conviction, the Court pointed out that the counsel appointed were experienced and the fact that a timely motion to quash the indictment was not filed may be explained as sound trial strategy, especially since the codefendant was not available.

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BLACK, wrote a dissenting opinion. This opinion took the position that if Michel's counsel on March 2 believed that he was not yet appointed and rendered no service, the appointment was not effective and Michel had no opportunity to raise his constitutional question within the critical three-day period before the term of the grand jury expired. As for Poret, the dissent argued that he had had no real opportunity to challenge the grand jury. While his flight was a wrong, "it is dangerous doctrine to deprive a man of his constitutional rights in one case for his wrongful conduct in another".

Mr. Justice BLACK also wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined. This opinion argued that the Court had given far too little weight to the constitutional rights of an accused to be indicted and tried by juries selected without racial discrimination. It pointed out that in Orleans Parish, where 32 per cent of the population is colored, only once, according to the record, could anyone remember a colored person being selected as a grand juror.

In No. 32, the case was argued by Gerard H. Schreibner and George H. Fust for petitioner and by Leon D. Hubert, Jr., for respondent.

In No. 36, the cases were argued by Felicien Y. Lozes and Rudolph F. Becker, Jr., for petitioner and by Adrian G. Duplantier for respondent.

Labor Law . . . *employer's refusal to bargain*

■ *National Labor Relations Board* v. *The Warren Company, Inc.*, 350 U. S. 107, 100 L. ed. (Advance p. 131), 76 S. Ct. 185, 24 U. S. Law Week 4037. (No. 27, decided December 12, 1955.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Judgment reversed and remanded.*

An employer must bargain with a union for a reasonable length of time after the National Labor Relations Board has certified the union

as the exclusive representative of the employer's workers. The Court of Appeals had refused to hold the employer in contempt for its refusal to bargain on the ground that a turnover in personnel had cost the union its majority status.

The CHIEF JUSTICE delivered the opinion of the Supreme Court reversing and remanding. The Court said that it found the facts to be contrary to the findings of the Court of Appeals, pointing out that the employer had refused to bargain for more than four years after the Board's original order and that it had deliberately used unfair labor practices to deprive the union of its majority status. It is the statutory duty of the Court of Appeals, on petition by the Board, to adjudge the employer in contempt of its enforcement decree the Court said. "The granting or withholding of such remedial action is not wholly discretionary with the court" the opinion declared.

The case was argued by David P. Finding for petitioner and by John Wesley Weekes for respondent.

The President's Page

(Continued from page 99)

and within financial reach of those who need us. To take any other stand at this time, when all institutions are being asked to justify themselves and our domain is threatened daily by alert laymen, is to invite new arrangements in which both the lawyers and the public might be the losers. Thoughtful members of the profession know that in this bewildering age of social, economic and political unrest the need for real lawyers is greater than ever. The big question is not whether there is a need for lawyers but whether we are willing to undergo the exertions necessary to maintain on merit our distinctive status. There is nothing unfair about our being faced with the necessity of "being good" in order to hold on to our clients and our livelihoods. That is the common lot of people in other endeavors everywhere.

Are we being prudent? Are we doing our best? Are we looking out for our own interests and are we meeting the public responsibilities which society laid on us a thousand years ago when the profession was first recognized in England? We have been proud to say we are a superior and learned profession working in the spirit of public service. We have been quick to point out that we are not tradesmen in the marketplace. We have indulged the thinking that ours is perhaps the greatest, as well as the largest, profession in this country. By comparison with other professions, what are we doing to warrant our making such a claim? How diligent and how much concerned have we been about our continuing legal education to keep us abreast of the times? What have we done to simplify and expedite court procedures and make legal services and the administration of justice less expensive and more prompt and accessible to the public? All business and trades people, without professional status, are constantly striving for increased efficiency and the cutting of costs, so as to do more for their customers for less money. Recent inroads of laymen on the practice of law and increasing recourse to arbitration and administrative tribunals would indicate that the trend is away from lawyers and courts of law. These matters should have our attention for our own protection and for the benefit of the public. Our fine state and local bar associations have important functions in many fields of service and fellowship, but the challenge which faces the legal profession in America today is nationwide and calls for a strong and broad-gauged response. We need educational programs and research into our own status and its future and we need public relations activities, on a broad scale beyond the resources of state and local associations.

The American Bar Association must meet the challenge. Last year we moved into our new American Bar Center. With sixty-four committees and seventeen Sections, and a well-trained headquarters staff of 100, we are better equipped than ever to serve the 241,000 lawyers of this country and the public; but the mere 24 per cent who are members of the Association cannot carry the load or leaven the hundred per cent. It is amazing that, although our annual dues are much lower than those of the other professions, their mobilization in their national bodies averages about 75 per cent, or three times as great as ours. As we have seen, the doctors have 83 per cent, the dentists have 86 per cent and the osteopaths have 72 per cent. We gravely need the interest, the views, the voices, the personal participation and the moral support of all lawyers if our great profession is to maintain its position in these uncertain times. We need more members in our fine enterprises; we need adequate budgets to finance them; and we need to have all American lawyers read our literature, use our services and facilities and feel the cultural impact of what we are doing for them and for the public. And we want lawyers generally to have the benefit of our unparalleled group life insurance arrangements, and to help us sponsor tax, social security and other legislation with due regard to the legitimate interests of lawyers.

Last fall we announced that the mobilization of the rank and file of the lawyers of this country in the national body would be the major new undertaking for the year, and be it said to the credit of the 58,000 lawyers who were members of the Association that, as a man, they sprang into action and already have embarked upon a campaign to double the membership before February 17. State and local bar associations are in the vanguard of the campaign,

which is under the chairmanship of Cecil E. Burney of Corpus Christi, Texas, a former President of the Texas State Bar, who also is Chairman of the National Conference of Bar Presidents. More than 10,000 busy lawyers of this country, young and old, are actual teamworkers who personally will call upon the prospects and receive the signed applications. It will not be possible to interview all of the 180,000 lawyers who do not belong to the Association, but those not on the prospect lists for interviews will be reached by mail. We take the position that the privilege of belonging to the American Bar Association is open to every American lawyer in good standing. This may be some shift in policy, but it is long overdue. To me it is a great privilege to have a part in this enterprise in which we hope to produce in a few weeks additional strength equivalent to all that which has been marshaled in the seventy-eight-year history of the Association. If we do this, which seems assured, we shall have reason to be proud of the profession and shall know that we are not unworthy of our great heritage.

A recent experience I long shall remember was the Christmas party of our staff at the Bar Center. Every employee was there—more than one hundred, including affiliated organizations—the fine and capable staff chiefs, some of whose rich service records range beyond twenty-five years, and the newest recruits who joined us in December—one big happy family—all proud to be a part of the Association—proud of what we are, and prouder still of what we are to be. There was mirth, there were exchanges of trinkets, a half dozen comic skits written, directed and acted by our own people, and there was a delightful supper served in our refectory—and, most important of all, there was love and kindly feeling, which prompted me in the language of Tiny Tim to exclaim: "God bless us every one." Surely there is something in the touch of the hand, in the sound of the spoken word. It was easy to see that even the newest of our group are thinking in terms of careers with the Association, and that those fine staff leaders who one day will be retiring are striving to make their successors even finer and more capable than themselves. I am grateful that it has been granted me to work in such a setting. Credit goes to no one person; the entire staff deserves the credit, but we are exceedingly fortunate that our wise, efficient and beloved Secretary, Joe Stecher, has been willing, on a part-time basis, to serve as Acting Executive Director.

I am continuing the visits to state and local bar organizations in all parts of our country. Among such meetings, since last reporting, have been a delightful banquet of the Law Club of Chicago, attended by several hundred stalwarts, under the fine leadership of President R. Corwine Stevenson and Secretary Clarence Fox; and the Annual Meeting of the Association of American Law Schools, ably led by President Maurice T. Van Hecke and Secretary Philip Mechem. At the latter meeting I discussed with a committee the plan to bring law teachers in greater numbers into the Association. We need the views, the voices and the general participation of the special groups, such as judges, teachers, government attorneys, and house counsel, if we are to be in truth the organization of the legal profession in this country. All these gatherings have been stimulating and enjoyable. They have a simple purpose—to make sure that law keeps pace with the developments in the world about us. The prompt responses to our recent calls for unified action give eloquent testimony to the common interests and ideals that animate the profession throughout the forty-eight states and the territories. Whether in common law or civil law, and in whatever place, we serve as one great priesthood the common cause of justice. Ours is the happy privilege of calling men everywhere to worship at the shrine of liberty under law. Whatever of my time and energy is needed in our undertakings I gladly am giving day and night, including Saturdays, Sundays and holidays.

Lest it appear that my work is unduly rigorous and exacting this year, let me hasten to say that I am allowing myself one special luxury: association with my bright-eyed six-months'-old granddaughter. She has taught me that the austerities of living are not incompatible with the sweetness of life. She understands and accepts me wholeheartedly as I am, but I shudder to think what my fate may be a few months hence, with her increasing wisdom. And I shall be growing more sensitive, for the cruelest of birthdays will have overtaken me before this reaches you. All of which suggests that the most be made of whatever time is left to us. Where could we find better opportunity—more agreeable or rewarding work—than in the civic aspects of the law! We who work together have the satisfaction of knowing that we are putting some stone and mortar into the cathedral of the profession of law. We, like the many who have labored for the Association and are now departed, are but passing instruments of a process which outlives our fleeting hour.

In the dispensations of numerology, it may not be granted some of us to see the climactic end of the new twenty-year period of the Association's expanding strength and service which begins this day, but we are the keepers of the citadel and we accept with reverence and gladness the present call to duty.

There is a great deal of interest in our 1957 London Meeting. We are not yet in position to announce details or to accept reservations, but we expect to do so in the near future and hope that you will bear with us in the meantime. As previously announced, Thos. Cook & Son and American Express Company have been appointed the official agents for the purpose of providing transportation, but they cannot act until our plans are officially announced.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

Antitrust Law . . . *damages*

■ A storm-window salesman's dream of matching Rocky Graziano and Ray Robinson in a prize fight has gone out the window, and he has failed in the Court of Appeals for the Seventh Circuit to collect anything in his treble-damages antitrust suit against the International Boxing Club.

The plaintiff's complaint was that he had made some telephone calls and preliminary arrangements for the bout, although he knew that both fighters were under exclusive contract to the I.B.C. When the contracts were ready, Graziano said Robinson should sign first, and Robinson refused to sign.

Claiming that Robinson's manager had orally agreed to sign and alleging that his plans fell through because of a conspiracy by all concerned to prevent him from becoming a fight promoter, the plaintiff sued for treble damages under the Clayton Act. The suit was allowed to stand by the District Court after the Supreme Court held in *U.S.* v. *International Boxing Club,* 348 U.S. 236, that professional boxing is subject to the antitrust laws.

But the Seventh Circuit affirmed summary judgment for the defendants on a simple ground: the plaintiff had no damages. The Court pointed out that he had never been licensed as a fight promoter and had not actually completed the contractual obligations required for the Graziano-Robinson bout. Thus, the Court said, he could not show the injury "in his business or property" necessary under the Act [15 U.S.C.A. §15]. "We can conclude, at most," the Court remarked, "only that he desired to enter the business, but has never engaged in it."

(*Peller* v. *International Boxing Club, Inc.,* United States Court of Appeals, Seventh Circuit, December 1, 1955, Lindley, J.)

Constitutional Law . . . *aid to private schools*

■ By taking a strict view of the power of the state legislature to pay the tuition fees of pupils from public funds, the Virginia Supreme Court of Appeals has apparently closed one of the talked-of methods of meeting the Supreme Court's segregation decision without a constitutional amendment.

The legislation in point appropriated funds for the education of servicemen's orphans by permitting public funds to be used for tuition, institutional fees, board, room rent, books and supplies of eligible children "at any educational or training institution of collegiate or secondary grade in the State of Virginia, approved in writing by the Superintendent of Public Instruction".

The Court held that since this legislation allowed the payment of tuition and fees to private schools—either sectarian or nonsectarian—it violated a Virginia constitutional provision prohibiting state appropriations "to any school or institution of learning not owned or exclusively controlled by the state or some political subdivision thereof". The act was also unconstitutional, the Court ruled, because it permitted the state funds to go to a sectarian school, in violation of the state's constitution and the First and Fourteenth Amendments of the Federal Constitution.

The Court did not accept an argument that the appropriation was primarily for the benefit of eligible children, and only incidentally for the benefit of the selected private schools. "Surely," it remarked, "a payment by the state of the tuition and fees of the pupils at a private school begun on the strength of a contract by the state to do so would be an appropriation to that school."

The Court distinguished *Everson* v. *Board of Education,* 330 U.S. 1, by assuming the soundness of its rationale, but by saying that the furnishing of transportation to pupils in a private or sectarian school was far different from paying tuition and institutional fees, which go directly to the institution and "are its very life blood".

To sustain the appropriation, the Court concluded, "would mean that by like appropriations the general assembly might divert public funds to the support of a system of private schools which the constitution now forbids. If that be a desirable end, it should be accomplished by amending our constitution . . . It should not be done by judicial legislation."

(*Almond* v. *Day,* Supreme Court of Appeals of Virginia, November 7, 1955, Eggleston, J., 89 S.E. 2d 851.)

Constitutional Law . . . *Smith Act*

■ The Court of Appeals for the Fourth Circuit has approved a conviction under the membership clause of the Smith Act, 18 U.S.C.A. §2385, holding that provision of the Act constitutional.

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

This was the first appellate-level consideration of the membership provision of the Act, which makes it a punishable offense to become or remain a member of a group advocating the overthrow of the Government by force and violence, while knowing the purposes of the organization.

The Court turned down an argument that this section of the statute was unconstitutional because it permitted "guilt by association". The Court found that the trial judge had carefully instructed the jury not to convict on the basis of the defendant's membership in the Communist Party (which was admitted), but only on a finding that the defendant knew the purposes of the Party.

The membership clause of the Smith Act, the Court declared, is "nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the Government by force and violence". By thus reasoning, it found applicable the *Dennis* case, 341 U.S. 494, where the Supreme Court affirmed a conviction for conspiracy to violate the other sections of the Act.

The defendant also argued that Section 4 (f) of the Subversive Activities Control Act of 1950, 50 U.S.C.A. §783 (f), blocked his conviction. That section provides that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of . . . any other criminal statute".

The Court rejected this position by declaring that the purpose of this provision was to insure the enforceability of the registration provisions of the Act by making the privilege against self-incrimination unavailable as a defense to failure to register, which the Act requires of Communist organizations. And, here again, the Court emphasized that the conviction was not for mere membership, but for membership with a knowledge of the criminal purposes of the organization. This, it said, was not exempted by the Act.

(*Scales* v. *U.S.*, United States Court of Appeals, Fourth Circuit, November 7, 1955, Parker, C.J.)

Courts . . . *dissenting opinions*

■ Dissenting judges who wish their opinions published in state reports may have to learn a lesson from the Supreme Court of Pennsylvania. The Court has held that the publication of a dissenting opinion of one of its members may be refused if the opinion is not filed in accordance with rules of appellate court practice.

Dismissing a mandamus action by an associate justice to compel publication of his dissenting opinion, the Court found two major faults with the opinion.

First, the Court said, the opinion decided the case on its merits, whereas the Court's majority opinion had dealt with the case as presenting no justiciable controversy. This made the dissenting opinion improper, the Court declared. In arguing this point, the justice had asserted that he had announced from the bench that he thought the case did present a justiciable controversy and that he had first joined in the Court's ruling, and later dissented when he discovered that the contemplated test action was not going to be presented to the Court.

The Court objected to the dissenting opinion, moreover, because it had been filed after vacation and had not been circulated among the other members of the Court. The justice had actually filed his dissent after the Court adjourned for summer vacation, but the Court's opinion in the case was not issued until several months later.

One justice, concurring in the result, thought that the trouble with the Court's publication rule was that there were no established "rules of appellate court practice" covering the situation. Noting that there are different varieties of opinions, dissenting and otherwise, he declared that an appellate court judge should have an absolute right to have an opinion filed and printed, whatever the label, if it were circulated and filed with the other opinions in a case.

(*Musmanno* v. *Eldredge*, Supreme Court of Pennsylvania, May 25, 1955, rehearing denied June 13, 1955, *per curiam*, 382 Pa. 167, 114 A. 2d 511.)

Criminal Law . . . *bigamy*

■ The Supreme Court of New Jersey had refused to change its position, which is in accordance with the majority view, that a guilty intent is not necessary to support a bigamy conviction. Accordingly, the Court, with one judge dissenting, has denied the appeal of a man who married after obtaining a Mexican divorce and was thereafter convicted of bigamy.

New Jersey law is quite clear that a Mexican divorce decree of the so-called mail-order variety, where there is no domiciliary-based jurisdiction, is wholly a nullity. Actually the defendant did not contradict this. His objection was that the trial judge had refused admittance to an exemplified copy of the Mexican decree. He declared that while this would not be evidence that he was legally divorced in New Jersey, it would be evidence tending to support his defense that he acted in good faith and without intention of committing bigamy.

The Court ruled, however, that bigamy was a statutory crime not requiring a criminal intent—or *mens rea*—and that ignorance or misconception of the invalidity of the Mexican decree would be no defense in any case. The Court noted in an exhaustive examination of cases that this "strict liability" rule has been criticized since it may "harshly result in the criminal conviction of persons who are not morally culp-

able", but that the doctrine was justified as being "in fulfillment of the strong public policy in favor of marriage stability."

The dissenter thought that a final judgment of divorce should be a defense to bigamy, unless the invalidity or worthlessness of the decree had been brought home to the defendant. He remarked: "Mr. Average Citizen who, as he did here, submits to one of the major state departments his application for a marriage license and sets forth therein in full that he was divorced by a Mexican divorce decree, giving its date and the court which granted it, has a right to assume he can utilize the very license issued by the state without going to jail for having done so."

(*New Jersey* v. *De Meo*, Supreme Court of New Jersey, November 14, 1955, Jacobs, J., 118 A. 2d 1.)

Criminal Law . . . *conspiracy*

■ The Court of Appeals for the Fifth Circuit had refused to hold that the common law concept of the unity of husband and wife prevents spouses from committing the crime of conspiracy.

The Court adopted the reasoning of the Court of Appeals for the District of Columbia Circuit in *Johnson* v. *U.S.*, 157 F. 2d 209, that the interest of society in repressing crime requires recognition of the "obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense."

The Court noted that civil law had always viewed husband and wife as existing separately, and that in almost all common law states the marital-unity concept has been severed by married women's acts.

There is diversity of opinion in the federal courts and among state jurisdictions as to whether a husband and wife can commit conspiracy. Recently, in a case of first impression in the state, the Supreme Court of Illinois ruled against the unity concept in *Illinois* v. *Martin*, 4 Ill. 2d 105, 122 N.E. 2d 245 (41 A.B.A.J. 166; February, 1955).

(*Thompson* v. *U.S.*, United States Court of Appeals, Fifth Circuit, November 18, 1955, Rives, J.)

Immigration . . . *blood tests*

■ The Immigration Service's use of blood tests with regard to Chinese seeking admission to the United States as children of citizens, when under the same circumstances blood tests would not be used for white persons, has been condemned by the United States District Court for the Southern District of New York as an unconstitutional discrimination based on race.

The Court found that the policy of the immigration officials is to apply blood tests to determine paternity to all Chinese and to no whites. This is done to test the Chinese applicant's claim that he is the China-born child of a United States citizen. Although the Government claimed in its brief and affidavits that blood tests were required of all races in all cases where there were no birth certificates or other documents of identity, the Court noted that the Government had pointed to no instance where a white applicant for entrance had been subject to a blood test or a Chinese excused from one.

The Court declared:

> They [the three Chinese applicants before the Court] made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the whites admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. . . . such a practice violates the Constitution.

The Court accordingly granted the petitioners' application for a writ of habeas corpus.

(*U.S. ex rel. Lee Kum Hoy* v. *Shaughnessy*, United States District Court, Southern District of New York, August 8, 1955, Dimock, J., 133 F. Supp. 850.)

Joint Tenancy . . . *murderer's rights*

■ Disavowing a former contrary decision, the Supreme Court of Illinois has held that one joint tenant who murders the other is not entitled to the entire estate by virtue of survivorship. The Court's solution is to permit the murderer to retain his one-half interest as a tenant in common with the decedent's heir, and to impose a constructive trust on the property for the heir's benefit.

The Court felt that *stare decisis* did not preclude it from altering the state's former rule. "The doctrine of *stare decisis*", it said, "is a salutary but not an inflexible rule furthering the practical administration of justice." Thus the Court rejected application of the legal fiction that a joint tenant is seized of the whole estate by virtue of the original grant, and that the estate cannot be divested without violating the state's constitutional provisions against corruption of blood or forfeiture of estate.

The Court also noted that since 1939 a state statute had precluded a murderer from inheriting by descent from his victim. While this provision would not govern a joint tenancy case, the Court declared, it did pointedly announce public policy.

The Court concluded that one of the implied conditions of a joint tenancy contract is that neither party will acquire the interest of the other by murder, and that when one murders the other, the essential four unities of a joint tenancy are destroyed. Therefore, it said, the right of survivorship is destroyed.

(*Bradley* v. *Fox*, Supreme Court of Illinois, September 23, 1955, rehearing denied November 21, 1955, Davis, J., 129 N.E. 2d 699.)

Military Law . . . *applicability*

■ Just two weeks after the Supreme Court decided *U.S. ex rel. Toth* v. *Quarles*, 76 S. Ct. 1 (42 A.B.A.J. 67;

January, 1956), the United States District Court for the District of Columbia found enough significance in the case on which to base a sweeping decision that no civilians are now amenable to trial by courts martial.

The defendant, the wife of an airman stationed in England, had been convicted by a court martial for the murder of her husband. Civilians accompanying the Armed Forces abroad are subject to military law under Article 1 of the Uniform Code of Military Justice, 50 U.S.C.A. §551, which is a carry-over doctrine of long standing.

In *Toth* the Supreme Court held unconstitutional a provision—new to military law when the Code was enacted in 1950—that an ex-serviceman could be tried by a court martial for certain crimes committed while he was in the service. But the District Court viewed *Toth* as going beyond this. The decision "virtually turned inside out a great many earlier decisions", the Court said.

The significance of the *Toth* decision, the Court declared, was not that it was dealing with an ex-serviceman, but rather that a civilian was involved. "In short, the Supreme Court says a civilian is entitled to a civilian trial", the Court asserted.

Accordingly, the Court granted the wife's petition for writ of habeas corpus.

(*U.S. ex rel. Covert* v. *Reid,* United States District Court, District of Columbia, November 22, 1955, Tamm, J.)

Segregation . . . *here and there*

■ American courts seem to be dealing more and more with cases involving racial segregation. Here are five recent ones:

Agreeing with the Court of Appeals for the Fourth Circuit in *Dawson* v. *Mayor and City Council,* 220 F. 2d 386 (41 A.B.A.J. 456; May, 1955), the United States District Court for the Eastern District of Texas has declared that segregation in the use of public recreational facilities is no longer constitutional.

The plaintiffs charged that Beaumont, Texas, officials had denied them the use of two municipally owned parks, in violation of a section of the Civil Rights Act, 28 U.S.C.A. §1343 (3), solely because they were Negroes. The defendants conceded the right of the plaintiffs to use the facilities, but urged the Court to fashion a decree permitting use only under "reasonable regulations" which would permit segregation as authorized by Texas law.

But the Court would hear none of it. Adopting the view of the Fourth Circuit that the *School Segregation Cases,* 347 U.S. 483, struck down segregation in public recreational facilities as well as in public education, the Court ordered a permanent injunction to establish the plaintiffs' right to "free and unrestricted use and enjoyment" of the parks.

(*Fayson* v. *Beard,* United States District Court, Eastern District of Texas, September 7, 1955, Cecil, J., 134 F. Supp. 379.)

■ An attempt to limit the effect of the *School Segregation Cases* to primary and secondary public education has been turned down by the United States District Court for the Middle District of North Carolina.

The University of North Carolina had denied admission to its undergraduate schools to three Negroes solely because of their race. The position of the University trustees was that the state had spent "millions of dollars in providing adequate and equal educational facilities" at the college undergraduate level, and that Negroes could attend those schools rather than the University. The University does, however, admit Negroes for graduate and professional studies not offered at a Negro college in the state.

The legal position of the trustees was that the *School Segregation Cases* outlaw racial segregation only in the lower schools and did not decide the college and university question.

The Court was unimpressed by this argument. Conceding that the decision of the Supreme Court necessarily was limited to the facts before it, the Court declared that the reasoning of the case was just as applicable, if not more so, to higher education. "Indeed it is fair to say that [the bases of the decision] apply with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life," the Court said.

(*Frazier* v. *Board of Trustees,* United States District Court, Middle District of North Carolina, September 16, 1955, Soper, J., 134 F. Supp 589.)

■ In Texas there was a suit for an injunction to restrain the use of public funds by a school district operating an integrated school for the first six grades. The plaintiffs also asked for a declaratory judgment that Texas constitutional and statutory provisions providing for segregated schools were valid.

The Supreme Court of Texas had little difficulty in affirming the lower court's denial of the injunction, but ran into some complexity in determining just how much of the Constitution and statutes to declare invalid.

The Texas Constitution provides: "Separate schools shall be provided for the white and colored children, and impartial provisions shall be made for both." The Court determined that it was obvious that the first part of this sentence had to go, but it decided that the second part should be allowed to stand in order to retain its safeguard for students in schools not yet integrated.

In dealing with the state's foundation school program act, the Court read sections providing for the separate allotment of teachers and funds as being simply a measure to insure equal teacher-pupil load in and support to both white and colored schools. Therefore, it ruled, the statutory provisions could stand, since under this interpretation a school district was not precluded from using teachers or funds in an integrated school. Only the provisions reiterating the constitutional man-

date of segregation were declared invalid.

(*McKinney* v. *Blankenship*, Supreme Court of Texas, October 12, 1955, Brewster, J., 282 S.W. 2d 691.)

■ North Carolina may have discovered an administrative device useful in delaying integration, as pointed out by the Court of Appeals for the Fourth Circuit.

In 1955 North Carolina enacted a statute providing for the enrollment by boards of education of children applying for school admission. The statute also sets up a board hearing procedure and judicial appeal for any child whose admission to a public school has been denied.

Thus, the Court said, there is provided an available administrative procedure for Negro children combatting segregation, and, continued the Court, nothing could be clearer than the doctrine that courts will not grant relief until administrative remedies have been exhausted.

The Court accordingly remanded the action, which was for an injunction permitting Negro children to attend a white school, with directions to the district court to stay proceedings pending the exhaustion of administrative remedies.

(*Carson* v. *Board of Education*, United States Court of Appeals, Fourth Circuit, December 1, 1955, *per curiam*.)

■ A case involving reverse racial discrimination has been decided by a New York Court. A white woman and her Negro husband were refused lodging at a hotel, and they both sued for damages under the state's civil rights law.

Deciding that the Negro husband was entitled to damages was easy, but if the white wife was discriminated against because of her color, did she have an action?

The Court ruled that the modern and enlightened view of the application of discrimination statutes was that discrimination could be a double-edged sword. The Court noted that the New York statute spoke of discrimination against "any person" by reason of race, color or religion, and it placed emphasis on the statute's prohibition of discriminatory practices employed either "directly or indirectly".

"To all but the naive," the Court remarked, "it is clear that a white woman may be the butt of a racial discrimination because she has elected to marry a Negro." The Court declared that it was convinced that each of the parties was rejected because of his respective color. This violated the statute, it continued, because the law looks with favor upon marriage "and New York does not frown upon an interracial marriage".

(*Hobson* v. *York Studios, Inc.*, Municipal Court of the City of New York, Borough of Manhattan, October 18, 1955, Wahl, J., 145 N.Y. S. 2d 162.)

Trusts . . . *deviations*

■ An Ohio common pleas court has permitted a deviation in the use of three trust funds administered for the benefit of the Cleveland Museum of Art. The deviation allows the funds to be used for the construction of additional space and improvement of existing facilities, whereas the original purposes of the trusts were the acquisition of works of art.

The Court applied the *Restatement of Trusts* rule that a deviation will be permitted where "owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust".

All the trusts, the Court said, manifested a clear intention to give Cleveland "a truly great art museum". At the time of establishment of the trusts, the Court continued, this was best effected by setting aside funds for the acquisition of objects of art.

But now, the Court declared, the museum's problem was not one of things to display, but space for display. Under these circumstances, the Court asserted that it was proper to inquire what the settlors would now do. And the Court felt it had no hesitancy in saying that they would willingly deviate to permit the trust income to be used for building expansion.

(*Cleveland Museum of Art* v. *O'Neill*, Court of Common Pleas of Ohio, Cuyahoga County, April 12, 1955, Lybarger, J., 129 N.E. 2d 669.)

What's Happened Since . . .

■ On November 7, 1955, the Supreme Court of the United States:

DENIED CERTIORARI in *Toft* v. *Ketchum*, 113 A. 2d 671, 114 A. 2d 863 (41 A.B.A.J. 743; August, 1955), leaving in effect the decision of the Supreme Court of New Jersey that the filing of charges against an attorney with an ethics and grievance committee is privileged and that no subsequent action lies in favor of the attorney for malicious prosecution.

■ On December 5, 1955, the Supreme Court of the United States:

AFFIRMED (without opinion) *Union Trust Company* v. *U.S.*, 221 F. 2d 62, leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit, which had in turn affirmed the decision of the United States District Court for the District of Columbia, 113 F. Supp. 80 (39 A.B.A.J. 829; September, 1953), that the United States is not shielded by the discretionary functions provision of the Federal Tort Claims Act from liability for injuries resulting from Government employees' negligence in regulating air traffic at a Government airport.

Activities of Sections

▪ In order to give our new readers a quick grasp of the work of the Association's seventeen Sections, we publish the following substantial but brief resumes of the scope and functions of each Section. The account of the Junior Bar Conference appears under the title "Our Younger Lawyers" on page 177. Much of the Association's most valuable work is done by the Sections.

SECTION OF ADMINISTRATIVE LAW

▪ The Section of Administrative Law was created in 1945 as successor to the Special Committee on Administrative Law, which had been primarily responsible for the drafting and enactment of the Federal Administrative Procedure Act. This Act is "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated one way or another by agencies of the Federal Government". The Section has general authority to preserve the gains made by the adoption of that Act and to develop and seek adoption of improvements thereof.

The Section is primarily interested in the procedural and operational aspects of administrative law rather than in the substantive aspects of administrative regulation. It strives to maintain unbroken contact with our democratic tradition of a government of divided powers under law. Its main concern is the improvement of "administrative justice".

The Section studies and makes recommendations on such subjects as the organization of administrative agencies in their adjudicatory and rule-making functions; hearing procedures; statutory protection for those who rely on administrative rulings; the availability, procedure and scope of judicial review of agency action; standards on admission to administrative practice and representation before agencies. Thus, the Section deals with a field which touches the professional activity of every lawyer.

Through the work of the Section, the general practitioner can find practical help in his dealing with administrative agencies. The administrative practitioner can benefit from the broader scope of its work.

The Section membership participates in its work through thirty-five active committees. The committees fall within three groups: those on particular federal agencies or activities, on particular legislation or proposals, and general and miscellaneous committees, including the National Committee, which coordinates the work of other committees on legislative proposals.

In the past, the Section has successfully opposed piecemeal exemptions from the Administrative Procedure Act which would cripple its effectiveness. It has pushed corrective legislation. It has furthered governmental re-examination of administrative procedures. In 1954, it helped secure judicial review of decisions by government contracting officers.

The current work of the Section includes an intensive study of the Reports of the Hoover Commission and its Task Force on Legal Services and Procedures, on which it will make recommendations to the Association at the 1956 Mid-Year Meeting. It is actively concerned with such problems as the recruitment, qualifications and removal from the possibility of agency influence of hearing examiners; protection for those who rely on administrative rulings; the standards for admission to practice before administrative agencies; and those statutory and administrative rules which have the effect of limiting the rights of citizens in adminstrative proceedings by restrictions on attorneys' fees. It is currently engaged in sponsoring legislation to provide for hearings in visa cases and opposing enactment of legislation to authorize impounding of mail without adequate safeguards.

The *Administrative Law Bulletin*, published periodically for Section members, is a unique and invaluable collection of developments in the field, including legislative, judicial and administrative developments and Section committee reports.

SECTION OF ANTITRUST LAW

▪ The Section of Antitrust Law deals with antitrust matters in all fields of the law. It endeavors to promote better legislation and a clearer understanding of the scope, requirements, judicial construction and administrative objectives of the antitrust laws with regard to corporations, co-operatives, trade associations, the Federal Trade Commission, and matters related to patents and trademarks. The Section publishes its proceedings at Section meetings for distribution to Section members.

The Section will hold its Spring Meeting at the Mayflower Hotel, Washington, D.C., on April 5 and 6. A dinner will be held at that hotel the evening of April 5. A large number of government officials are expected to attend. On April 6, a progam will be presented by the Clayton Act Committee of the Section. Eight speakers, drawn from government and private practice, will discuss questions of current interest having to do with various facets of the Clayton Act.

The Section's semi-annual publication, which appeared in November, has been enthusiastically re-

ceived. It was the largest of the Section's publications to date and included, in addition to the proceedings at the Philadelphia meeting, a reprint of an excellent article by the Federal Trade Commission's General Counsel, a review by Thomas E. Sunderland of anti-trust developments during the year ending July, 1955, and a timely report of the Section's Subcommittee on Subsidiaries in Foreign Trade. The book also contains nine articles dealing with the Report of the Attorney General's National Committee.

The Section's present chairman, Fred E. Fuller, drew heavily on the newer members of the Section in making appointments to the Section's nine committees. More than one hundred members of the Section are serving on its various committees.

SECTION OF BAR ACTIVITIES

■ The Section of Bar Activities is the normal channel for communication between the 1500 state and local bar associations in this nation and the American Bar Association.

Its primary purpose is to support the efforts of the organized Bar.

Its aim is to do whatever will assist state and local bar associations in collecting and disseminating information in those areas of activity which are engaging the attention of lawyers throughout the nation and placing before the American Bar Association those of national scope.

This Section started the ball rolling for state bar integration, public relations through the press and radio, judicial councils, co-ordination of bar activities, regional meetings, conferences of bar association officers and many other projects of the American Bar Association now handled by Special Committees.

Currently this Section is responsible for the Awards of Merit made each year to state and local bar associations for outstanding work by such associations. It has committees on the economic condition of the Bar and law office management.

It is represented on the Committee on Continuing Legal Education of the American Law Institute.

The *Coordinator ad Public Relations Bulletin* grew out of the work of this Section.

With the facilities now available to the American Bar Association at the new American Bar Center, this Section has an unlimited opportunity to fulfill its role as a liason agent between the American Bar Association and all the state and local bar organizations and to make more effective the work of the organized Bar, to the end that all bar associations of the country may present a common front in attacking the problems which confront the legal profession today.

Most of us are willing to do something for our profession when it is brought to our attention that there is need for some activities along this line. That is why the Bar Activities Section is so important to the American Bar Association. It is constantly and continually bringing to the attention of the members of the Section and of the Bar generally, needs of the legal profession. A glance at some of the programs for the past several years will certainly bear out this statement. We have had excellent speakers on a variety of subjects, some of these with the following titles: Medico-Legal Problems and Inter-Professional Agreements; Disciplinary Procedures; Modern Trends in Expert Medical Testimony; How To Make Your Law Practice Pay; Public Relations Between the Bar and Lay Groups; Ethics and Unauthorized Practice; Lawyers and the Fifth Amendment.

It is impossible to estimate the influence that the programs of the Bar Activities Section have had on the state and local bar associations throughout the country. Even in the smallest bar organization, many of its activities can be traced back to a beginning in the Bar Activities Section. It has been properly stated that this is not one of the so-called "bread and butter" sections of the American Bar Association. It is submitted, however, that by bringing about better public relations with the Bar and more profession-conscious members of the Bar, this Section is indirectly responsible for a lot of "bread and butter".

This Section has always directed its efforts toward improving the condition of the individual lawyer throughout the nation, regardless of the particular field of his practice. The public generally is not concerned with a particular field of practice. The public makes its appraisal of lawyers on the basis of those things which are definitely within the scope of activity of this Section.

The officers of this Section are in hearty accord with the words of the late Theodore Roosevelt, "Every man owes some of his time to the upbuilding of the profession to which he belongs".

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ This Section has conducted half-day meetings on the subject of creditor rights at the Regional Meetings in October in St. Paul and in November in New Orleans. It will conduct such a session at the Regional Meeting in Hartford in April on the subject of closely held corporations. Members of active committees of this Section who have devoted themselves to thorough study of the problems discussed have served as panel members in the two meetings held last fall and will serve in the meeting to be held in April. A transcript of the panel discussions at St. Paul and New Orleans will be presented in the January issue of the quarterly publication of the Section, *The Business Lawyer,* which is sent to every member of the Section.

The November issue of *The Business Lawyer* was devoted to a complete transcript of the proceedings of the three half-day sessions of the Section at the Annual Meeting of the Association in Philadelphia in August. Those members of the Section who did not attend are thus afforded an opportunity to benefit from the arduous work devoted to

the preparation for these sessions. The November issue of *The Business Lawyer* was mailed to every member of the Section in good standing at the end of November, but those who paid the small $3.00 annual dues of the Section and thus in addition to their American Bar membership have qualified as members in good standing of the Section for this current year will receive copies of the November, as well as the January issue of *The Business Lawyer* as long as they last.

The semi-annual meeting of the Council of the Section and the chairmen of its committees will be held in Chicago on Sunday, February 19, at the Edgewater Beach Hotel immediately preceding the convening of the Midyear Meeting of the House of Delegates and the conducting of other midwinter activities of the Association. Interim reports of the committee activities and interesting articles with reference thereto will appear in the issues of *The Business Lawyer* next fall.

The Committee on Corporate Laws has sponsored the Model Business Corporation Act and in this connection has recently rendered invaluable aid to those who have recently recodified the Business Corporation Laws of several states. The Committee on Non-Profit Corporations has under study current provisions of its Model Act. The Committee on Partnerships expects to present during the year in *The Business Lawyer* suggested forms for general partnerships, professional partnerships and partnerships in oil and mining ventures.

In succeeding columns of the JOURNAL, we hope to present a similarly brief report on the activities of more than thirty other committees which are active in fields of great interest to lawyers whose practice involves any of the numerous fields of law embraced within the very broad and general sector covered by the name of this Section.

SECTION OF CRIMINAL LAW

The Section of Criminal Law became a dues-paying Section only last year, thus formalizing its membership rolls for the first time. Traditionally, this Section's work has been supported by Association members whose "bread and butter" interests centered elsewhere. Most of its major projects have concerned issues somewhat removed from practice at defense counsel's table in the criminal courts.

Efforts are now being made to serve the defense Bar more directly. Annual Meeting programs have included more "workshop" and demonstration sessions; a new Committee on Defense Procedure and Tactics has been organized; and the Section has sponsored programs of practical value at several recent regional meetings. Lawyers whose practice includes defense work are especially urged to associate themselves with the Section and to share in its activities.

Criminal law has been termed "the orphan of American jurisprudence". Yet the administration of criminal justice constitutes the largest volume of work in all courts, local, state and federal. Public attitudes towards Bench and Bar are principally determined by observation of the criminal courts, where popular interest centers.

Thus the Section has always attracted the interest and support of men dedicated in a high degree to public service. Its achievements have been predominantly service to the profession and the nation, rather than direct benefits to its own members.

As is characteristic of endeavors *pro bono publico,* Section projects have sometimes matured slowly and have often undergone transmutations in the process. But the record of achievements traceable in whole or in part to the Section of Criminal Law is impressive. Section interest in the court-martial system during and after World War II led to the appointment of the special Vanderbilt Committee, which figured prominently in the development of the present Uniform Code of Military Justice. Section deliberations on the problem of bringing war criminals to justice, long before VE and VJ days, foreshadowed the pattern of the Nuremburg and Tokyo trials with surprising accuracy.

Pioneering efforts with regard to the handling of juvenile offenders led to the development of the Youth Authority Act, under the auspices of the American Law Institute, and its adoption in numerous jurisdictions. Section criticisms of inadequacies and inequities in the general body of criminal law applicable to the several states played a part in launching the vast Model Penal Code project now being carried on by the A.L.I. And Section deliberations helped launch the Federal Rules of Criminal Procedure drafting committee.

The Association's vigorous Traffic Court Program and Traffic Court Institutes trace their origin to Section concern with the shortcomings of inferior court procedures; the special Donnell Committee on professional responsibilities with respect to crime was appointed at the instigation of the Section; and a 1951 Section study session on individual rights as affected by national security eventually led to the appointment of the special Seymour Committee to conduct further inquiries into that subject.

When Senator Kefauver began his exposé of organized crime, the Section co-operated from the outset. The special Patterson Commission, headed by Section chairman Walter P. Armstrong, Jr., after Judge Patterson's death, aided in the preparation and promulgation of twenty-three federal statutory measures; the Commission also divided the preparation (in co-operation with the A. L. I., the Commissioners on Uniform State Laws and others) of six model state crime bills, several of which have since been enacted by one or more states.

Early in 1953, when the committee directing the Association's new Research Center was casting about for suitable research projects, the Section came forward with its loftiest aspiration. It proposed a full ap-

praisal of the principles and standards controlling the administration of criminal justice in the United States, as the Foundation's first major undertaking. Such a study, long deferred and much needed, is now actually under way.

The Section is following developments resulting from the *Durham* case, which proposed a revised test for mental competency in criminal trials, with great interest. A proposal by Judge Sobeloff to permit appellate review of federal court sentences, pending in Congress in the form of proposed legislation, has Section approval and will be submitted to the House of Delegates in February. A joint American Medical Association-American Bar Association study of the narcotic drug problem, initiated and sponsored by the Section, is just getting started. And the Section's newest committee, on Lawyers and Organized Crime is recruiting members.

SECTION OF INSURANCE LAW

■ Consistent growth and significant contribution to the American legal, business, governmental and social communities have characterized the Section of Insurance Law since its organization in 1933. With only several hundred members and four committees in 1933 the Section now has almost five thousand members and eighteen committees.

The purpose of the Section is to promote the development of the law of insurance in all of its branches, to stimulate and extend this field of the law, to co-operate in obtaining uniformity and intelligent interpretation of insurance law with respect to both legislation and administration and to simplify and improve the application of justice in insurance law. The organization and activities of the Section reflect these purposes and contemplate the broad latitude that makes this Section of such particular interest to most members of the Bar.

Membership in the Section is in no way limited to lawyers who have what might be described as an "insurance practice". The fact is that many lawyers have found that this Section best encompasses the problems that confront the lawyer in the general practice. While members of the Section may read papers at the Annual Meeting and at Regional Meetings which are devoted to subjects in which they have made original research, the subjects discussed are within the area of current legal controversy. The *Proceedings* of the Section contain sound, usable material prepared by lawyers with vast experience in the subject discussed. The *Proceedings* is a welcome tool to be used in the solution of many problems.

Some members of the Section are trial specialists. Legal-medical panels and trial tactics panels have increased in popularity to the extent that such panels are not only featured at the Association's Annual Meeting, but they are also presented at various regional meetings. The response to these panels has been excellent and, again, the lawyer in general practice has an opportunity to hear some of the nation's best-known trial lawyers and physicians discuss problems which confront all trial lawyers in connection with the settlement of litigation. A record is made of these panel presentations and they, too, are incorporated in the *Proceedings*.

Perhaps the most significant contribution by members of the Section has been the preparation of annotations on the New York Standard Fire Insurance Policy, the Automobile Insurance Policy and the Workmen's Compensation Policy. These annotations are bound volumes, source material not only for the lawyer in general practice but also for those who have a specialized practice—banking, insurance, or manufacturing. There probably is not a man, woman or child today who does not have a direct or indirect interest in the contents or interpretation of an insurance contract and it is difficult to imagine a lawyer who is not called on from time to time to answer a client's question with respect to an insurance contract. Such a contract may well describe the client's future solvency or the well being of the client's family.

Insurance company legal executives have also found that the Section offers an excellent forum for the discussion of insurance coverages and policy considerations.

Participation in Section affairs by governmental officials (attorneys general, insurance commissioners, revenue officials and judges) is recognition that the Section is considering worthwhile matters and is contributing useful ideas. Certainly, some of these matters are considered to the extent that new areas of uniformity, understanding, regulation and supervision result.

The Section of Insurance Law has a worthy tradition, its members work together in the best interest of the Bar. It is a working section with new and old members alike encouraged to participate in the Section's numerous and broad activities. Its growth and continuing attraction to members of the American Bar Association can only be most satisfying to Section members and to those other members of the American Bar Association who first recognized that insurance did merit a particular place within the framework of the Association.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ The Section of International and Comparative Law, founded in 1933 under the leadership of the late Dean John H. Wigmore, has become increasingly more important to the practicing lawyer in this era of expanding international trade and investment.

The work of the Section is carried on by more than forty committees which aid lawyers in keeping up with questions of public and private international law and comparative law. Section committees deal with such subjects as the handling of war claims, relations between the executive and legislative branches of the

government (including constitutional aspects of international agreements), international legal aspects of fisheries and territorial waters, communications, control of atomic energy, copyrights, double taxation, trade regulation, transportation. Also considered are foreign economic law, and procedures for peaceful settlement of international disputes.

Other committees co-operate with bar associations in this country and abroad in the promotion of interchange of jurists and international judicial co-operation, and consider the constitutional structure and current activities of the United Nations. A special committee is studying the present proposal to revise the United Nations Charter.

The Comparative Law Division analyzes and compares the law of Latin America, Europe, the Near and Far East. The membership of the ten committees of this division includes many authorities on the laws of these areas and the annual reports usually contain reviews of the development of these particular fields of law and are of practical value to lawyers.

The *Proceedings of the Section of International and Comparative Law*, an annual publication, contains a summary of the proceedings of the midyear and annual meetings of the Section, including the text of the addresses given before those groups. In addition, this publication contains the reports of the various committees of the Section and for this reason serves as a valuable guide to the practicing lawyer having interests abroad. The last annual report of the Latin American Law Committee is typical. That report discussed a wide variety of developments in the law of Latin America which took place during the preceding year, including such matters as the Argentine Investment Law, the Carácas Conference, the Brazilian Exchange Control Law, the Inter-American Bar Conference, changes in the Cuban Real Property Law, operation of limited liability companies in Colombia and changes in the Mexican income tax law.

The Committee on International Double Taxation, which is composed of international tax experts, presents an annual report containing information which is of the greatest practical importance in the conduct of foreign business. The most recent report of this committee contained a detailed summary of the income, estate, and gift tax conventions with Japan which were signed on April 16, 1954.

The Committee on International Law in the Courts of the United States presents an annual summary of cases involving international law in the courts of the United States of special interest to practicing lawyers.

The Section provides lawyers with the opportunity to obtain information which they should find useful in solving their everyday problems and, as leaders of the community, in keeping abreast of the growth of international law.

SECTION OF JUDICIAL ADMINISTRATION

■ The Section of Judicial Administration, as its name indicates, devotes its activities to one of the most important purposes of the American Bar Association, namely, the improvement of the administration of justice. Because of the nature of its work, many of the members of the Section are judges of federal or state courts, while others are practicing lawyers or law teachers. The Section feels that all three groups must be represented in order to achieve its objectives.

The Section carries on its activities in three different channels. First, it conducts programs at the Annual and Regional Meetings of the Association, consisting of speeches and informal discussions by prominent persons interested in the aims of the Section. The purpose of these discussions is to inspire the work of the members and others as well as to help direct it into proper channels. Second, the Section appoints committees for study of specific subjects. For example, this year there is a Committee on Appellate Practice and Procedure, the Chairman of which is Chief Justice Arthur T. Vanderbilt of New Jersey, for the purpose of endeavoring to study methods of simplifying appellate procedure and eliminating appellate delays. Another committee is studying the subject of impartial medical testimony and the methods by which its use may be brought about. This committee is headed by Presiding Justice David W. Peck, of the Appellate Division, First Department, of the Supreme Court of New York, who has been a pioneer in introducing such a system in New York City. Another committee is studying the procedure for adjudication and commitment of incompetent persons, with a view to devising improvements in procedure and preparing a model act. This committee is headed by Thomas Gillespie Walsh, Chairman of the Mental Health Commission of the District of Columbia. Still another committee deals with the subject of family courts; it is headed by Judge Paul Alexander, of Toledo, Ohio, whose work in this field is well known. Other similar subjects are being actively investigated and studied by other committees. The third activity of the Section consists of appointing state committees in every state of the Union and the District of Columbia. These state committees constitute a very vital part of the Section organization. Their function is to endeavor to advance the objectives of the Section within their respective jurisdictions. They do so by acquainting the local Bench and Bar with the aims of the Section, and by co-operating with state, county and city bar associations in reaching the various goals. These committees are the workers in the field and will reach the grass roots.

The aims of the Section were first set forth in a series of reports made by Chief Judge John J. Parker in 1937 and 1938, and later elaborated in detail by Chief Justice Vanderbilt in his book on *Minimum Standards for the Administration of Justice*. This year the Section is con-

centrating its activities on the following objectives:

1. The restoration of the rule-making power to the judiciary, and as a corollary the simplification of judicial procedure.
2. The extension of the use of pre-trial practice.
3. The creation of a single, unified judicial structure in each jurisdiction equipped and implemented with administrative facilities.
4. The restoration to state trial judges of the common law power to instruct the jury orally and in that connection to summarize the facts and comment on the evidence.
5. The improvement of qualifications and method of selection of jurors, and instruction of jurors in their duties by distribution of pamphlets and by oral explanations.

All members of the Association are invited to become members of the Section and to join in its activities.

SECTION OF LABOR RELATIONS LAW

■ The Section of Labor Relations Law serves three purposes:

(1) It provides a meeting place and forum for the exchange of ideas among lawyers representing both management and labor;

(2) It aims to keep its members informed concerning developments in labor law;

(3) It makes recommendations on matters of non-partisan professional concern.

Section activities are focused on the two-day meeting at the Annual Meeting of the Association, but the real work of the Section is done by standing committees set up to enlist the widest possible participation throughout the year. The Section has established standing committees with revolving membership on such topics as the National Labor Relations Act, state labor legislation, improving the processes of collective bargaining, and the administration of union-management agreements. New committees are established from time to time on special subjects of immediate importance. For example, one special committee is currently preparing recommendations on the Hoover Committee Report on Legal Services and Procedure. Another committee is studying the law of voluntary labor arbitration with a view to recommendations on the need for additional legislation and, if needed, the form the statutes should take. Committee reports are presented and discussed at the annual meeting.

The committee reports and annual meeting are also designed to keep lawyers abreast of developments in labor law and administrative policy—especially those busy lawyers with a general practice. It has become customary for one paper to review the labor cases decided by the United States Supreme Court during the previous year. The Committee on State Labor Legislation regularly collects and analyzes not only statutory changes but also state court decisions. At the last meeting a superb paper was delivered on the trend in NLRB policies under the Republican Administration. Officials from government agencies also take part in the meetings; in August the five members and the General Counsel of the National Labor Relations Board participated. The papers presented at the annual meeting are printed in the annual *Proceedings,* together with all committee reports, where they furnish Section members a useful source of reference and analysis.

The Labor Relations Law Section seeks to keep common professional ground for all lawyers interested in labor relations whether they are general practitioners or specialists, whether they represent employers or labor unions. Membership on the Council is evenly divided between lawyers representing management and unions. The Section avoids recommendations on issues of substantive labor policy likely to divide substantial segments of labor and management opinion, but it does formulate and actively sponsor recommendations for improvements in legislation or administrative practice having to do with procedure and other matters of professional concern.

The Section participates regularly in the Regional Meetings, where its programs present speakers and panel discussions on current significant problems of labor relations law.

SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

■ One of the seven standing committees created by the original Constitution of the Association was the Committee on Legal Education and Admissions to the Bar. The Committee functioned effectively for several years before it evolved into the present Section in 1893.

The Section directs its efforts toward improvement in law school standards and requirements for admission to the Bar. In 1921, when Elihu Root was the Chairman of the Section, the Association on the recommendation of the Section, adopted definite minimum standards for admission to the Bar. The Section is responsible for raising and maintaining standards of legal education throughout the country. It inspects the various law schools to see to it that they achieve the minimum standards set by the Association and it publishes an annual *Review of Legal Education* which summarizes the law school and bar admission requirements in the United States.

The list of approved law schools has grown year after year. The Section sponsored the organization of the Association of American Law Schools in 1900, and the National Conference of Bar Examiners was established in 1931 primarily through the efforts of this Section.

The program of continuing legal education for lawyers, currently offered by the American Law Institute, came from a recommendation of the Section near the end of World War II.

SECTION OF MINERAL LAW

■ The program and activities of the

Section of Mineral Law are of practical benefit as well as interesting and inspiring to any lawyer engaged in any of the phases of mineral law.

The work of this Section deals with the law covering oil, gas, coal, hard minerals and uranium and the Section concerns itself with all subjects which either directly or indirectly affect these great natural resources.

Its committees on oil, gas, coal and hard minerals prepare each year very thorough and constructive reports. Theses reports are without doubt the most complete analysis of the law and all of its many phases that can be found anywhere. The law on these great natural resources is perhaps more subject to change than any other division. Mineral law is relatively new in our jurisprudence, but the laws, both federal and state, the court decisions and regulatory orders are numerous and voluminous and owing to the technical and scientific information that is necessary in order to properly produce these natural resources, there naturally arises at all times very serious questions of law that must be properly understood for the lawyer to be in a position to properly advise his clients.

Each and every lawyer will find material in the reports of this Section prepared each year, most helpful in his everyday practice. The Mineral Section also keeps up with all publications of every kind that are of interest to the mineral lawyer and in addition, it co-operates in a special service with the Interstate Oil Compact Commission in publishing annually a "Report on Oil and Gas Conservation Activities".

Uranium being a very new subject, we believe it needs special mention.

In the commercial development of this fissionable material, the laws concerning mining claims and other minerals have become confused to the extent that it appears that a new procedure and perhaps some new fundamental law will need to be established in order that this vital material may be properly produced.

This Section has taken the lead in making an objective study of this phase of the law which should be of extraordinary interest to any lawyer interested in the development of any of our natural resources. We believe that any lawyer not now a member of the Mineral Section, could justify membership solely on account of the outstanding services that this Section is rendering through its effective committee on uranium.

The Mineral Section has held its meetings regularly for more than a quarter of a century and many of its members have attended practically all of the sessions and participated in the area meetings of the American Bar Association. Its membership is interested in all phases of the law that tends to advance our American free enterprise.

The friendship that has been established among the members throughout the years is indeed worthwhile and we believe that our sessions present the opportunity for personal contact and association equal, if not superior, to any other.

It is hoped that every lawyer in the United States, who is interested either directly or indirectly, will join this Section. We believe that we have a great future and that our Section will become more effective year by year.

SECTION OF MUNICIPAL LAW

■ The purpose of the Section of Municipal Law is to study current problems of every unit of local government, including counties, districts, authorities, true municipalities and even those of the state itself, and to suggest solutions for these problems; to keep all the members of the Section informed regarding current decisions in the field of municipal law and the acts passed by the legislatures of the various states relating to municipal government or municipal finance, and finally to provide a forum for the discussion of these subjects. Its membership consists of approximately 1200 attorneys who are interested in municipal law. The largest group is composed of city, village and county attorneys and attorneys for public authorities. The Section, however, has many members in the universities and law schools throughout the country, and most of the well-known bond attorneys are members.

To study current problems in this field of the law, the Section has established twenty-four committees. These committees cover practically every important field of municipal law. To mention but a few, there have been established committees on condemnation and condemnation procedure, special revenue and authority obligations, urban renewal, housing, urban traffic and parking, planning and zoning and metropolitan area government. In addition, there are permanent liaison committees with the Investment Bankers Association and with the National Institute of Municipal Law Officers, the National Municipal League, the Municipal Finance Officers Association of the United States and Canada, and a committee on law school co-operation. The reports of these committees, many of which are authoritative treatises on current developments in the phases of municipal law which are their respective spheres, are published by the Section as soon as practicable, and are mailed without charge to the members of the Section.

The liaison committees serve many valuable purposes. Their contacts with other professional organizations enable the Section to keep informed regarding the problems which are arising in other fields. The practical results of this co-operation may be illustrated by considering the work of one of these committees. The Investment Bankers Association some time ago advised that there were two pressing current problems in the field of public finance. One was the burden put upon public officials in the execution of bond issues. Bond issues of 100, 200 and even 300 million dollars or more

are not unusual today. In many states, laws enacted many years ago when bond issues were of more modest size, often require the signatures of as many as four officers on the bonds. Even when these large bond issues are signed on signature machines at the rate of twenty at a time, it still takes a considerable amount of the time of these public officials and involves a considerable expense to execute the bonds and put them in shape for delivery. Moreover, practically all of these laws require the impressing of a seal upon the bonds. To impress the seal upon two to three hundred thousand separate instruments is a time-consuming and expensive operation.

The Liaison Committee with the Investment Bankers Association drafted a bill to authorize certain public agencies to authorize the execution of bonds with the facsimile signatures and seals. This bill has been enacted in several of the states. A bill drafted by this Committee designed to check the filing of nuisance suits has been enacted by the legislature of Virginia. It is pending in the legislatures of several other states.

The Section publishes a monthly news letter which is mailed to every member of the Section. The editorial comments upon current decisions which appear in the news letter are extremely valuable to any practicing lawyer.

SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

■ This Section is concerned primarily with federal, state and international law having to do with patents, trademarks and copyrights, and with problems which arise from day to day in connection with the practice of these branches of the law. At present, the Section has forty active committees. Most of the committees include twelve or more members. At the Annual Meeting, these committees report to the Section on all matters of interest to the Section members. In the past few years, the Section has been active in assisting in the amendment of the patent and trademark laws, and at present is interested in a general revision of the copyright law.

There is a subsection for each group. The Patent Subsection has six committees. In the work of these committees, consideration is given to suggested revisions in the existing patent law as well as problems relating to the Patent Office and its administration, situations which confront the individual inventor in its efforts to patent and market its invention, problems dealing with government ownership of patents, government requests for licenses and federally financed research, contractual questions arising out of patent licenses, employer-employee relations, patent clauses in purchase orders and patent problems arising because of differences in the laws of various countries.

The Trademark Subsection has five committees. It has been active in the protection and improvement of trademark rights under the state, federal and international laws. Among the laws which have been improved through its efforts are the Lanham Act and the Model State Trademark Law. In addition to law revision, it is interested in the practice, administration and fees and services of the Patent Office, and in trademark aspects of unfair competition.

The Copyright Subsection consists of four committees, concerned with the effect of copyrights upon creators, users and the public at large, pending domestic legislation as well as legal and other developments in the field of copyright. It also reports on the Copyright Office activities and legislation and other legal developments in the international field. One committee is concerned with the revision of the copyright law, and is composed of a group of experts who are co-operating with the Copyright Office.

Under the supervision of the Vice Chairman of the Section, there are ten committees concerned with questions involving atomic energy, ethics and grievances, Federal Rules of Civil Procedure, promotion of contracts between lawyers desiring work in the patent, trademark or copyright fields, membership, protection of industrial designs, review of articles of interest to the Section, publicity, investigation of unauthorized practice and consideration of unfair competition apart from trademark infringement.

Under the supervision of the Chairman of the Section, there are fifteen committees dealing with the Annual Meeting, recommendations regarding improvement of committee work, drafting of resolutions, representation of the Section before committees of Congress, and co-operation with various Standing Committees and other Sections of the Association.

Throughout its history, the Section has endeavored to assist its members not only in solving patent, trademark and copyright law problems, but also in working with the general Bar in an effort to co-ordinate its branches of the law with the general practice of the law.

SECTION OF PUBLIC UTILITY LAW

■ The Public Utility Law Section of the American Bar Association renders three basic legal services to its members: First, it analyzes and publishes the current judicial decisions in the various fields of public utility law. Second, it presents thorough discussions of the most important current public utility issues at a series of meetings held during the Annual Meeting of the American Bar Association. Third, it follows national legislation keeping the members advised of developments and appears before Congressional committees and administrative bodies when properly authorized by the Section and the Association.

The Section has a Standing Committee which annually publishes a thorough review of the year's developments in public utility law. It is a handbook for public utility lawyers

who attempt to keep up to date on utility decisions. The members of the committee are outstanding utility lawyers from all types of utility practices in all sections of the country.

At the Annual Meeting a series of papers, panel discussions and question-and-answer periods are designed to amplify the analysis of the utility issues most important at the particular time.

Developments in federal legislation are closely followed. When deemed advisable the Section takes a position with respect to pending legislation and authorizes its officers to appear on its behalf. For example, the Section is currently reviewing the recommendations of the Hoover Commission and its task force to the extent that they affect utilities. The Council of the Section has unanimously recommended opposition to the proposal that an administrative court be created to review utility decisions.

A poll of the Section will be taken on the matter and subsequently the Section's position referred to the House of Delegates.

SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

▪ The Section of Real Property, Probate and Trust Law came into existence in 1934 and was first known as the Section of Real Property. Two years later the scope of the Section was widened to include probate and trust law and the present name adopted. The membership of this Section has shown a constant growth which reflects the fact that the Section, primarily through the work of its various committees, has brought to the persons interested in these fields of law scholarly reports on topics of current interest and trends in the development of legal theories.

The 78th Annual Meeting of the American Bar Association in Philadelphia last summer saw the Section present its twentieth consecutive annual meeting in conjunction with the parent body. The attendance of some three hundred members from practically all states of the Union gave testimony to the prominence of the speakers and the practical yet scholarly nature of their talks.

In order to perform a greater service for those lawyers who might not be able to attend the Annual Meetings of the Association, the Section in recent years has actively engaged in the regional meetings of the Association at Atlanta, Phoenix, St. Paul, Cincinnati and New Orleans and has presented programs geared to local needs without overlooking current problems of national interest. Similar programs are presently contemplated for the forthcoming regional meetings in Hartford, Baltimore and Spokane.

The addresses presented at the Annual Meeting, together with the annual committee reports of the Real Property, Probate and Trust Law Divisions of the Section, are printed and distributed to the Section membership. The reports of the twenty-four committees of the Section, in addition to reflecting current trends in judicial decisions, legislation and literature, seek to assist in the development of legal theory on many problems confronting the practicing lawyers such as relative priority of government liens, acceptable titles to real property, improvement of conveyancing and recording practices, planning and developing metropolitan communities, improvement of probate procedure, simplification of security transfers, pension and profit-sharing trusts, management of infants' and incompetents' property, state and federal taxation and draftsmanship of wills and trusts. The work of these committees has resulted in the preparation of a Model Probate Code, the development of specimen pension and profit-sharing plans and trust agreements, model wills and trust agreements, and constructive assistance in the drafting of the United States Supreme Court rule to govern condemnation cases in federal courts.

One of the most rewarding experiences of membership in the American Bar Association is active participation in the affairs of one or more of its Sections. You are invited to accept this opportunity to participate in and contribute to the improvement of law and legislation in these fields of law.

SECTION OF TAXATION

▪ The Section of Taxation of the American Bar Association was created in 1939. It already has more than 5,600 members, largely because taxation has become such a vital part of the practice of law. General practitioners as well as tax attorneys receive substantial advantages from membership in the Section.

No one practices law today without attention to questions of taxation that inevitably arise. The Taxation Section is not only concerned with the highly specialized tax questions; it is equally interested in the development, effect and administration of the "bread and butter" provisions that touch every individual, every business transaction, every trust and estate. The Section is not wholly concerned with income, estate and gift taxes; excise and miscellaneous taxes are given considerable attention. Also the Section has a committee actively engaged in studying state and local tax questions.

Members of the Tax Section have an opportunity to join the committee which studies the provisions that interest them most. The committees consider the adequacy and necessity of Code provisions, their administration and enforcement, and the possibility of improvement. Each Section member's own study and suggestions can help to improve both the law and its administration. The annual reports of committees are distributed to each member prior to the annual meeting of the Section. In many cases, this affords the member advance information on proposed changes in the tax law. These reports often survey the important developments during the

year in areas of immediate interest and warn members of current pitfalls and bouts. These reports are supplemented by discussions or practical demonstrations at the annual and regional meetings of the Section. The educational by-products of these activities are obvious.

The Taxation Section benefits from the membership of general practitioners, as well as tax counsel, because the tax law depends so often on the application of principles of general law. The general practitioners bring education and experience to the Section in this respect which is essential in the performance of the functions of the Section.

The 1954 Internal Revenue Code is a typical example of the public function performed by the Section. The Section played a very important part in recommending and developing many of the changes embodied in the 1954 Code. There were actually included in the new Code sixty-nine changes sponsored by the Tax Section. There are already plans for a bill to improve the 1954 Code and the Section is presently working on proposals to be submitted to Congress. The Section is also currently engaged at the request of the Treasury and the Commissioner of Internal Revenue in commenting in detail on the proposed regulations that are being issued. A summary of these comments is regularly distributed to the members, thereby indicating in advance possible changes in the proposed regulations.

The officers and committee chairmen of the Section discuss general questions relating to the tax laws and their administration with government officials when this is deemed necessary.

The members receive quarterly the *Bulletin* which describes the activities of the Section and current developments in the tax law. The *Bulletin* is prepared for quick reading; it alone is worth the modest dues of $6.00 per year.

The Section maintains a permanent office at 1025 Connecticut Avenue, Washington 6, D. C. This office is under the direction of the Executive Secretary of the Section.

Notice by the Board of Elections

■ The following jurisdictions will each elect a State Delegate for a three-year term beginning at the adjournment of the 1956 Annual Meeting and ending at the adjournment of the 1959 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

Nominating petitions for all State Delegates to be elected in 1956 must be filed with the Board of Elections not later than March 30, 1956. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt February 27) cannot be published prior to distribution of ballots, which will take place on or about April 6, 1956.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 30, 1956.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, *Chairman*
William P. MacCracken, Jr.
Harold L. Reeve

Tax Notes

▪ Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman; John S. Nolan, Vice Chairman.

Deductibility of Lobbying and Related Expenses

By George D. Webster

▪ Section 162 (a) of the Internal Revenue Code allows as a deduction from gross income "the ordinary and necessary expenses" paid or incurred "in carrying on any trade or business". In a general sense, it is manifest that lobbying expenditures are frequently more necessary and more important to a business enterprise than other types of clearly deductible expenses.

However, a Treasury Regulation (118, Sections 39.23 (o) -1 (f) and 39.23 (q) -1 (a)) has long provided:

> Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

This same provision, appearing in earlier regulations, was upheld as valid in *Textile Mills Securities Corp.* v. *Commissioner,* 314 U.S. 326 (1941). Even though this provision has never been inserted in the Regulations under the business expense section,[1] the Supreme Court held in *Textile Mills* that the language of the Regulations applied to deductions under this section. In that case, the taxpayer was employed by a large part of the German textile interests to secure reimbursement from Congress for property seized under the Trading with the Enemy Act of 1917. The expenses of the undertaking were to be borne by the taxpayer in return for a contingent fee based upon the amount recovered. Pursuant to the contract, the taxpayer corporation retained a publicist and two lawyers. After the passage of the Settlement of War Claims Act of 1928, the taxpayer sought to deduct from its federal income tax return as ordinary and necessary expenses the amounts paid to the publicist and lawyers. The Court denied a deduction for these expenses, stating (page 338) that "The words 'ordinary and necessary' are not so clear and unambiguous . . . as to leave no room for an interpretative regulation". In approving this administrative interpretation the Court may have been influenced by the fact that payment to the corporation-taxpayer was to be made on a contingent fee basis; but the holding was clearly not limited to this type of lobbying.

The cases antedating *Textile Mills* are reflective of a theory that to be nondeductible an expenditure for lobbying or for the promotion or defeat of legislation must have been for an illegal, sinister or objectionable purpose. The decision of the Supreme Court probably makes untenable any assertion today that the prohibition in the Regulation aforementioned is so restricted. It follows that *Textile Mills* is not to be construed as an approval of the disallowance of only those lobbying expenses contrary to the public policy. The recent case of *Lilly* v. *Commissioner,* 343 U.S. 90 (1952), makes it clear that *Textile Mills* is based not on considerations of public policy but on the administrative interpretation of the statutory business expense section.

The lower court cases subsequent to *Textile Mills* have followed it with some reluctance. Nevertheless, these decisions have shown a strong tendency to disallow the deduction of expenditures generally regarded as proper both from a legal and moral point of view. This applies to both direct and indirect expenses. For instance, a deduction for legal fees paid for appearances before the House Ways and Means Committee in opposition to legislation proposing to place a federal tax on parimutuel betting was disallowed in *Delaware Steeplechase & Race Association,* 9 T.C.M. 893 (1950).

Moreover, this disallowance constitutes a ban on the deductibility of all expenses which are the ordinary incidents of a legislative appeal, including legal fees, travel and hotel expenses, public relations and economist fees, etc.[2] In this connection, it should be noted that the interdiction is considerably broader than those activities constituting "lobbying". This term has been judicially restricted to representations made directly to a legislative body, its members or its committees. *United States* v. *Rumely,* 345 U.S. 41 (1953), and *United States* v. *Harriss,* 347 U.S. 612 (1954). However, the phrase "the promotion or defeat of legislation" provides for wider coverage and renders non-deductible many expenses outside the scope of "lobbying". *Mary E. Bellingrath,* 46 B.T.A. 89 (1942).

Apparently, the Commissioner has been conservative in his disallowance of these expenses, and the decided cases in large part involve disallowances in business enterprises on the fringe of legitimacy. See *Anthony Cornero Strable,* 9 T.C. 801 (1947) (gambling ship operator); *Domemico E. Fazzio,* 2 T.C.M. 737 (1943) (slot machine operator).

On the other hand, if the expenses are not "lobbying" expenses, or other expenses for the promotion or defeat of legislation, then they have been held deductible. Thus, in *Smoky Mountains Beverage Co.,* 22 T.C. 1249 (1954), the president

1. It is suggested that the regulations under Section 162, when issued, will contain this or a similar provision.

2. *Cf.* the English rule permitting the deduction, *Morgan* v. *Tate & Lyle, Ltd.,* [1953] 2 All E.R. 162 (C.A.) (Deduction allowed to sugar refinery for expenses of campaign opposing nationalization of sugar industry).

of the company traveled at the request of the Tennessee Department of Finance and Taxation from his home office in Knoxville to the state capitol where certain meetings were held in connection with a proposed beer tax bill. A trip was made to Chicago for the same general purpose, and the expenses of both trips were held deductible; no "lobbying" occurred as these activities did not have for their purpose either the promotion or defeat of legislation. The Court of Claims recently allowed a deduction to an individual for the expenses incurred in his business of "lobbying". *Black* v. *U.S.*, 129 F. Supp. 956 (Ct. Cl. 1955). The taxpayer-lobbyist was permitted to deduct one half of his Washington hotel bill attributable to lobbying activities. This may be justified by analogy to the rule in respect of the deductibility of the legal expenses of an illegal business. *Cf. Sam Mesi*, 25 T.C. No. 64 (1955).

Alternatively, it may be possible to deduct otherwise non-deductible lobbying or related expenses as contributions to trade associations. This is so despite the fact that the Commissioner has prevailed recently in two asserted disallowances of deductions for contributions to business associations which spent a major portion of their resources in attempts to influence legislation. *Roberts Dairy Co.* v. *Commissioner*, 195 F. 2d 948 (8th Cir.), *cert. denied*, 344 U.S. 865 (1952), and *American Hardware Co.* v. *Commissioner*, 202 F. 2d 126 (4th Cir.) *cert. denied*, 346 U.S. 814 (1953). It should be emphasized that in each one of these cases it was explicitly determined that the association involved had been organized and operated primarily for the purpose of influencing legislation. But see *McClintock-Trunkey Co.*, 19 T.C. 297, 301, reversed on another point, 217 F. 2d 329 (9th Cir. 1954).

The Commissioner's efforts to disallow the deduction of assessments made to the usual trade association have failed. In one case, he sought to disallow the assessments paid by a corporation to the National Association of Manufacturers on the ground that the amounts so paid constituted a contribution to an organization which was carrying on propaganda or otherwise seeking to influence legislation. *Addressograph-Multigraph Corporation*, 4 T.C.M. 147 (1945). The deduction was allowed, however, since this was not the major purpose of the organization involved. A similar result has been reached in the case of a contribution to the Chamber of Commerce of the United States. *Smith-Bridgman and Company*, 16 T.C. 287 (1951). This result is reached even though these organizations may register under the Federal Regulation of Lobbying Act. Recently, the Commissioner has initiated a new attack and has been disallowing a small part of association dues, based on the allocable portion of expenses devoted to lobbying and the promotion or defeat of legislation. See Rev. Rul. 54-442 (1954), 2 Cum. Bull. 131.

It should be emphasized that the policy considerations underlying the disallowance of lobbying expenditures as business expense deductions are quite dissimilar to those underlying the denial of a tax exempt status, and thus a governmental subsidy, to those organizations, otherwise properly qualified as charitable or educational, a substantial part of the activities of which is seeking to influence legislation.

In conclusion, it is clear that lobbying and other activities seeking to promote or defeat legislation, on both the federal and state levels, have become ordinary, necessary and governmentally encouraged[3] modes of representation. This factor, together with the Commissioner's apparent conservativeness in disallowing such expenses and the fact that many such expenses are properly deducted as contributions to trade associations, has resulted in suggestions for a basic reconsideration of this entire area. Such a reconsideration may eventually result in a partial legislative reversal of the *Textile Mills* case.[4]

EDITOR'S NOTE: The tax note in the December issue of the JOURNAL was contributed by John O. Paulston, of Los Angeles. His name was inadvertently omitted.

3. See press release of House Ways and Means Committee announcing public hearings of June 16, 1953, *et seq.*, relating to tax revision.

4. The only suggestion of a judicial reversal is in the *Lilly* case, *supra*, where the Court states that *Textile Mills* disallowed only "some types" of lobbying expenses.

Howard W. Pollock

(Continued from page 132)

leadership in organizing Philadelphia Citizen Committee Against Juvenile Delinquencies and Their Causes.

Pollock joined the post World War II migration to Alaska where he personally cleared 80 acres, built two cabins, his own roads and cultivated the soil. At the urging of his neighbors he ran successfully for the Alaska legislature and distinguished himself as chairman of the committee on statehood.

Prior to his Navy experience he served as a merchant marine seaman. In his college years, he was track team captain and state high jumping champion at Perkinston, Mississippi, Junior College and while there he was national president of Phi Theta Kappa, junior college scholastic honorary society.

Members of the judging panel for this year's selections included: Ezra Taft Benson, Secretary of Agriculture, U. S. Dept. of Agriculture; Dr. Abba Hillel Silver, Rabbi, The Temple, Cleveland, Ohio; George Meany, President, American Federation of Labor-Congress of Industrial Organizations; Ernest K. Lindley, Director Washington Bureau, *Newsweek;* and Robert Gordon Sproul, President, The University of California.

OUR YOUNGER LAWYERS

William C. Farrer, Secretary and Editor-in-Charge, Los Angeles, Calif.

▪ All members of the American Bar Association under 36 years of age are members of the Junior Bar Conference, which functions as one of the seventeen Sections that carry on the work of the Association. The Section provides for the effective participation of the young lawyer in the Association and through the Junior Bar Conference the younger lawyer is represented professionally on the national level.

The Association offers every advantage and break to the young lawyer:

1. Dues for the first two years after applicant's admission to the Bar are $4.00 per year and for three years thereafter, $8.00 per year; and only after five years of practice are regular dues of $16.00 per year effective (The American Institute of Accountants' regular dues are $40.00 per year).

2. The group life insurance program is tailored to the younger lawyer. For an annual premium of $20 per year, $6,000 worth of insurance is in effect to age 25, $5,000 to age 30, and $4,000 to age 35.

3. The Junior Bar Conference is a *non-dues paying* section of the Association.

4. The young lawyer may join any of the seventeen Sections devoted to special fields of law such as Taxation, Labor Relations, Insurance, Real Property, Probate and Trust Law, Corporation, Banking and Business Law, and many others.

5. The young lawyer may participate in regional meetings and the Annual Meetings of the Association, and receives every month the JOURNAL with its excellent articles on topics of interest to the legal profession and comments on court decisions of note. Members of the J.B.C. also receive the quarterly publication *The Young Lawyer,* which covers the activities of younger lawyers and state and local Junior Bar groups over the nation.

J. B. C. Activities

Of paramount importance to the young lawyer since it will benefit him throughout his career is the legislative program of the Junior Bar Conference. The Chairman of the J.B.C. Activities Committee testified before the House Ways and Means Committee last summer endorsing legislation intended to afford self-employed persons an opportunity to create private retirement funds comparable to funds created through corporate pension funds (Jenkins-Keogh Bill). The favorable sixteen-eight committee vote on the proposed legislation may well be attributed in some small measure to the support of the J.B.C. in speaking for the younger lawyers of the nation. The J.B.C. has worked for and endorsed voluntary social security even prior to the adoption of a similar position by the Association.

Through the Association's Unauthorized Practice of the Law Committee and its J.B.C. counterpart, a constant vigilance is maintained to protect the public from those who are unqualified to act in legal fields; and working with the national associations of insurance carriers, publishers, collection agencies, realtors, accountants and life insurance companies, statements of principles have been formulated to clearly define what constitutes the practice of law. The Committee has resisted efforts of unqualified individuals to practice law before administrative courts and agencies and supported state unauthorized practice committees in prosecution of instances of unauthorized practice.

The Association is the only national organization which represents lawyers in their fight to improve the administration of justice.

The officers and executive council

Young Lawyers at Work. Pictured above are members of the District of Columbia staff of the "Young Lawyer", the Junior Bar Conference's official quarterly publication. (Seated) Margaret Pallansch, Past Assistant Editor; Elizabeth Elward, Assistant Editor; Charlotte P. Murphy, Editor-in-Chief; Ruth Joyce Hens. (Standing) Lt. Edward J. Foley, Lt. Nathaniel Kenyon, Francis P. Borden Jr., Isabelle R. Cappello, J. Parker Connor, Maj. George S. Prugh, Jr., and Albert M. Christopher. Frances L. Nunn, our lawyer-photographer, was behind the lens, while Donald R. Gormley and John M. Murray were absent when the photo was taken.

are elected by the members of the Conference who attend the Annual Meeting and the work of the Conference is carried on through 18 national committees, including Activities, Affiliate Units, Law Students, Public Information, "The Young Lawyer," Unauthorized Practice, Lawyer Placement, Lawyer Reference, Practice Development, Procedural Reform, Traffic Courts, Annual Meeting, Inter-American Bar, Membership, Legal Institutes, Medico-Legal, Military Service and By-Laws. In addition to the program as directed by the executive council, these committees stimulate local and State Junior Bar groups to carry out projects of benefit to the profession.

The confidence of the Association in the Conference can well be demonstrated by the Special Membership Drive, wherein they are operating with parallel organizations and budgets and by the allocation of 15,000 of the 50,000 new member goal to the Conference committee. The J.B.C. Executive Membership Committee has the assistance of 48 State Chairmen and 106 Municipal Chairmen in cities of over 100,000 population and over 1,100 County and Municipal Division Leaders. This working staff is composed of the outstanding young lawyers in each community who have voluntarily assumed the task of more than doubling J.C.B. membership.

In view of the results obtained by strong national organization in all other professional fields of endeavor, the young lawyer should be well aware of the need for and the benefits to be derived from membership in the American Bar Association.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

▪ Most of the time, the nation's lawyers seem to be doing things for other people. A recent book (Blaustein and Porter, *The American Lawyer*) went so far as to say that devotion to the work of their neighbors makes lawyers more closely resemble clergymen than any other professionals. Only recently, for example, the American Bar Association established a Committee on Participation in Public Affairs, and The Florida Bar has just followed suit. The aim, among others, of these committees is to get good men to go into politics and government –to get lawyers to do their neighbors' work.

Judging from the journals of the various bar associations, however, the lawyers have started to think just a little bit about themselves—at least on the topic of social security. Several journals—including the *Texas State Bar Journal* and *The Shingle,* publication of the Philadelphia Bar –have been discussing whether lawyers should be included under Social Security. And the *Los Angeles Bar Bulletin* and *The Shingle* discuss the Jenkins-Keogh Bill, which would allow certain self-employed persons, including lawyers, to postpone the income tax on amounts paid into certain private retirement funds. The Philadelphia Bar has endorsed the Jenkins-Keogh Bill. And in New York, George Roberts, Chairman of the Special Committee on Retirement Benefits of the American Bar Association, has recruited twelve "bright and attractive" young lawyers to visit local congressmen and urge them to pass the measure at this session. Mr. Roberts predicts that somebody will get a tax break during election year, and says it may as well be the self-employed as anyone else.

One observer—he is both a doctor and a lawyer—suggests that lawyers should worry more about their health. Herbert Kornblitt, M.D., LL.B., says that "the practice of law has above average occupational health hazards", but that lawyers just do not worry about them ."Lawyers", he says in an article reprinted in *The Journal of the Cleveland Bar Association,* "are 'medical delinquents'; they have a peculiar and extraordinary tendency to break the rules of good health." It's only when a well-known lawyer dies at fifty that his colleagues rush to the doctors' offices for examinations.

Kornblitt, who originally published his article, "The Health of Lawyers", in the September edition of his publication, *Current Medicine for Attorneys,* claims that lawyers are particularly subject to constitutional diseases—heart maladies, arteriosclerosis, diabetes and cancer. The reason, he suggests, is that lawyers thrive—economically at least—in an environment of constant intellectual conflict. But this environment of strife is not healthy at all!

The so-called "psychosomatic diseases" are an additional great hazard for the lawyers, according to Kornblitt. These show themselves through malfunctioning of the digestive tract, the skin, the nervous system and heart, and by migraine, facial and eye tics, nervous stomach, ulcers, asthma, various skin disorders, and anxiety states. And the reason that lawyers are so prone to these illnesses, says Kornblitt, is that they are "highly civilized" and too often suppress their instincts for the benefit of their pocketbook or reputation. Instead of throwing the irritating client out of the office, the lawyer placates him. Kornblitt says that the rare lawyer who expresses himself—who acts mad when he *is* mad—never becomes a psychosomatic case, even though he may not have many friends in the legal profession.

But the organized Bar persists in helping its neighbors—among them, persons who cannot help themselves.

▪ The National Legal Aid Association and the American Bar Association are currently campaigning to get Legal Aid offices set up in some fifty American cities—all of them with more than 100,000 population —that now lack such offices. Orison S. Marden of New York City, the President of the National Legal Aid Association, and William T. Gossett, of Dearborn, Michigan, Chairman of the American Bar Association Committee on Legal Aid Work, recently inaugurated the campaign. "Is it not time to substitute action for fine-sounding words, to take steps we have repeatedly declared by solemn resolution should be taken?" Mr. Marden said. And Mr. Gossett stated that "No one activity of the American Bar Association has more to do with the real strengthening of democracy than its effort to extend Legal Aid." Each bar association that establishes a Legal Aid Service meeting minimum requirements will receive a Public Service Award from the National Legal Aid Association.

On another front, the Cleveland Bar Association has raised more than $23,000 from its members to help pay for the defense of eleven persons accused of violating the Smith Act. The defendants said they could not afford to pay lawyers, and because the case is in a federal court, lawyers appointed by the court might have had to serve a year or more without pay. So, the Cleveland Bar Association arranged for six law firms to furnish or compensate six of the seven court-appointed counsel, and general contributions will pay the seventh lawyer and the costs of the trial. Thus, the entire profession helps bear the cost. The Cleveland Association has received a commendation from the Ohio State Bar Association for its work.

▪ Public relations are claiming a great deal of attention from bar associations all over the country. The State Bar of Texas has not only dis-

tributed some 275,000 pamphlets on the law to the public; it also has received a steady stream of requests for a special metal rack designed to display the variety of pamphlets at insurance agencies, banks and other public places. And members of the Bar of Amarillo, Texas, helped stage a mock trial for the education of prospective jurors. The Board of Governors of the Nevada State Bar has authorized the Public Relations Committee for Washoe County, whose chairman is John Shaw Field, to put on a series of thirteen fifteen-minute radio programs about the law and lawyers. The Association of the Bar of the City of New York, in co-operation with the Civil Liberties Union, has recently published a pamphlet, "If You Are Arrested. . ." which sets forth rights and duties incident to arrest, and tells citizens where they can get help if they need it. A fuller understanding of the law and lawyers grew in the public mind as a result of many local bar programs commemorating the birth of John Marshal. The Bar Association of St. Louis, to cite one example, sponsored the film, "Decision for Justice", on television; its lawyers spoke at schools and universities; pamphlets on Marshall were distributed by the Bar; a special Marshall program was put on the weekly radio show sponsored by the Junior Section of the St. Louis Bar, and all of the city's libraries, at the request of the Association, made special displays of books and other material on the great Chief Justice.

■ In addition to their other activities, the nation's bar associations are spending increasing time on young lawyers and law students. President Goodnow of the Detroit Bar Association has been continuing his policy of putting more young lawyers on association committees, and the Minnesota State Bar Association has launched a drive for funds for the State Bar Foundation, whose primary purpose is to grant scholarships to students in the state's three law schools. In Florida, members of the State Bar have participated in a new program designed to acquaint beginning law students not only with the technical aspects of the law, but also with the traditions and ethics of the profession. The two-day program took place at the College of Law of the University of Florida. The Junior Bar Section of the Iowa State Bar Association, recognizing "the importance of a closer liaison between the Iowa Bar and its law students", has initiated a "Law Student Award Program" under which practicing lawyers give recognition to outstanding achievements in the law schools. Recent recipients of the $100 awards were Milford Gene Blackburn of the College of Law at Drake University and Jack W. Peters of the College of Law of the State University of Iowa. And in Brooklyn, Charles J. Buchner, president of the Brooklyn Bar Association, has offered to help find jobs for young lawyers interested in trial work. Mr. Buchner says one great cause of court congestion is a shortage of trial lawyers, and yet many young men say it is impossible to get a start in that work. Mr. Buchner offers a helping hand.

■ The battle of the bar associations against unethical conduct and unauthorized practice seems to never cease. From West Virginia comes a report that the Committee on Legal Ethics has administered reprimands to four attorneys—the first actions of this type in the history of the State Bar. And the Ohio State Bar Association's Committee on Local Bar Activities has recently sponsored a "Workshop on Unauthorized Practice", which included addresses and general discussion of the problem. In Ohio, the Legal Ethics and Professional Conduct Committee of the State Bar Association has urged that a qualified, full-time employee be hired to handle investigations of complaints and to follow up the judgments of the committee. The Committee, of which Matthew J. Smith is Chairman, has concluded that the complaints "cannot be promptly or adequately disposed of by the committee method". Finally, a special committee of the Utah State Bar Association and the Utah State Medical Association has promulgated "Standards of Practice Governing Lawyers and Doctors". In a preamble, the Committee acknowledges that "a substantial part of the practice of law and medicine is concerned with the problems of persons who are in need of the combined services of a lawyer, doctor and hospital; and that the public interest and individual problems in these circumstances are best served only as a result of standardized cooperative efforts of all concerned. . . ." The standards deal with such matters as doctors' reports and doctors as witnesses. Also included is a standardized Medico-Legal Authorization by which a client would give his lawyer power to provide for the payment of doctors' fees.

■ The Empire State Chapter of the Federal Bar Association has unanimously elected Miss Mollie Strum for an additional year's term as president. Miss Strum, a trial attorney in the Justice Department, recently received the Distinguished Service Citation of the New York State Federation of Business and Professional Womens' Clubs, and was the only woman lawyer invited by the Federal Judiciary to the Judicial Conference for the Second Circuit at Hartford. As President of the New York Chapter of the Federal Bar Association, Miss Strum has planned and presided at forums that attracted the Bench, Bar and general public.

■ Several state and local bar associations have established machinery for the collection of law books so urgently needed by the young governments in the Far East. The original appeal for law books was made by Chief Justice Robert G. Simmons of the Nebraska Supreme Court, who, during a visit to the Orient two years ago, found judges and lawyers there "hungry for American law

books". One distinguished jurist, Judge Simmons says, was studying American jurisprudence in the library of the American Information Office. The appeal has been met by the Ohio State Bar Association, among others, by designating its law library committee to solicit the state's lawyers for lists of old case books and texts. The lists will be sent to Judge Simmons, who will screen them. The Ohio State Bar Association will pay for packing any book, designated by Judge Simmons, and the United States Information Agency will pay the transportation to the Orient.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe . Editor-in-Charge

ANTITRUST: From a bread-and-butter standpoint the practicing lawyer would be well advised to address a letter to the Superintendent of Documents, Government Printing Office, North Capitol and H Streets, N. W., Washington, D. C., and request the Report of the Attorney General's Committee on its recent Study of the Antitrust Laws, price one dollar; the Report of the Federal Trade Commission with respect to mergers, price 55 cents; the final report of the Hoover Commission, price 25 cents; and the Report of the Task Force of the Hoover Commission on Legal Services and Procedures, price $1.25. The importance of each of these reports to lawyers cannot be overstated and discussion of them will occupy many hours at bar association meetings and fill many pages of all the law reviews. Their publication in 1955 was the number one legal event of the year.

The chairmen of the Attorney General's Antitrust Committee were Stanley Barnes, the current trust buster, and S. Chesterfield Oppenheim, the Michigan Law professor. It is quite appropriate therefore to find the *Michigan Law Review* devoting its entire June, 1955, issue (Vol. 53, No. 8, pages 1033 to 1152) to a symposium on the report. For a copy write the *Review* at Hutchins Hall, Ann Arbor, Michigan, and send $1.50. I strongly advise anyone who gets the Committee's Report to send for this Michigan symposium for two reasons. First, it is very well written. Second, the nature of the Committee's Report is such that after you finish a chapter, you need a critical appraisal of what you have read to sharpen and focus your thinking. Test this out by reading Chapter 4 of the Committee's Report against the superlative piece Kendall DeBevoise writes with respect to it in the Michigan symposium.

I must make one further comment. Not enough practicing lawyers write for the law reviews. And it is refreshing to see so many of them contribute to this Michigan symposium.

The Michigan symposium begins with "Basic Antitrust Concepts" by Professor Kenneth S. Carlston of the University of Illinois Law School (pages 1033-1058). Professor Carlston summarizes and evaluates Chapter 1 of the Committee's report. The problems of Sections 1 and 2 of the Sherman Act are discussed, including the tug of war between the *per se* violation approach and the rule of reason, special difficulties in proof of conspiracy, the probative value of "conscious parallelism", the nature of monopoly power, and the meaning of trade or commerce among the several states. Although the writer disagrees with some aspects of the Committee's conclusions, he predicts: "The clarity and exactness of its analysis and the intrinsic persuasiveness and authority of its statements will have a continuing and substantial effect in the adjustment of antitrust controversy both in and out of our courts."

The next article is: "The Antitrust Laws in Foreign Commerce" by Robert A. Nitschke, of the Michigan Bar (pages 1059-1072). The application of antitrust concepts to business conducted outside the United States is a confusing problem, marked by extreme positions. Mr. Nitschke provides a summation of the Committee's report, which he believes lays a foundation for the clarification and solution of these difficulties. The application of the rule of reason test to foreign trade, the permissible scope of joint activities abroad, as well as factors of international politics are considered in this thoughtful article.

With Mr. Nitschke's piece I strongly advise the reading of the article by Professor Wolfgang Friedman, of the University of Toronto Law School, in the February, 1955, issue of the *Canadian Bar Review* (Vol. 33, No. 2, pages 134-63) with respect to the Canadian antitrust laws (write the Canadian Bar Association for this, 88 Metcalfe Street, Ottawa, Ontario, Canada, and send a dollar) and the article by Joseph W. Burns, of the New York Bar, in the October, 1955, issue of the new *Antitrust Bulletin* (Vol. 1, No. 5, pages 303-327) with respect to the British, French and Italian antitrust laws and the problems facing American businessmen in Europe (write Federal Legal Publications, Inc., 18 Rose Street, New York 38, New York, for this copy of the *Antitrust Bulletin* and send $2.00 for it or $17.50 for ten issues).

The significance of the article by Mr. Burns is twofold. He is Chief Counsel of the Kilgore Antitrust Committee which since April, 1955, has been studying what legislative recommendations, if any, are to be made to the second session of the

84th Congress in 1956 with respect to the Committee's Report. Senator Harley W. Kilgore, of West Virginia, is Chairman of the Judiciary Committee of the Senate and also Chairman of its Subcommittee on Antitrust and Monopoly. The other members of the subcommittee are Senators Wiley, Langer, Dirksen, Hennings, O'Mahoney and Kefauver. Hearings were held with respect to foreign trade and Senator Kilgore and Mr. Burns held conferences in the fall of 1955 with American businessmen in London, Paris and Rome. Those interested in foreign trade will want to read the report Mr. Burns has written about what our businessmen abroad told him and Senator Kilgore. Those of us who are not so interested in foreign trade will want to obtain a copy of the report that the Kilgore Antitrust Committee makes to the 84th Congress at its second session.

I must also call to the attention of the profession the article (pages 289-301) that Professor Morris D. Forkosch, of Brooklyn Law School, has in this same issue of the *Antitrust Bulletin* with Mr. Burns'. During 1955 Congress passed two very important antitrust laws. Fines have been increased from $5,000 to $50,000. A uniform four-year statute of limitations for treble damage actions has been enacted. And *United States* v. *Cooper,* 312 U.S. 600, has been overruled and the United States may now sue for single damages at its own legal expense. Professor Forkosch contends that, when the United States sues, "only a consumer's injury may be made the basis for such an action; and that, insofar and to the extent that the United States is an entrepreneur and suffers damages 'in its business', its remedy lies elsewhere."

In the June, 1955, Michigan symposium, Kendall B. DeBevoise, of the New York Bar, writes on "Antitrust Policy in Distribution" (pages 1073-1092). His piece is outstanding. DeBevoise recognizes that the Committee had "to fish or cut bait" as to whether the Clayton Act as amended by the Robinson-Patman Act conflicts with the Sherman Act. DeBevoise says "it cut bait" and attempted to "harmonize" the three acts.

> Because of it, few affirmative legislative recommendations appear. Rather is the general result a well-intended lecture on how, hopefully, the law should be interpreted administratively and judicially. And no matter how it may be received in various quarters it constitutes, for the practitioner the completest yet most compact Hornbook on the subject now available. [page 1075].

The valuable feature of the DeBevoise article is that he addresses his remarks to Chapter 4 of the Committee's Report and takes up each phase *seriatim*. He agrees that "refusals to deal" "are generally safe from antitrust if not conceived in combination or conspiracy" and the present law is satisfactory. But when the Report takes the position that no legislation is necessary with respect to exclusive dealing because "the Federal Trade Commission has voluntarily taken the 'actual Foreclosure' (of the market) approach in preference to the Supreme Court's 'quantitative substantiality' (in the *Standard Stations* case and) "what is good for the commission is good for the courts", DeBevoise remarks,

> Where this leaves the matter is the reader's guess. If the Federal Trade Commission were to reverse the field and apply the Standard Stations rule (which it has every right to do) would this part of the Report become a wilderness voice? Without legislative Recommendation of any kind, this part is little more than a lawyer's brief on one side of a very real question [page 1078].

DeBevoise favors repeal of the fair trade laws and praises this part of the Report. But he is not so sure about phrases in the Robinson-Patman Act as the Committee. "Goods of like Grade and Quality" probably will be strictly construed. But the Committee is optimistic in believing that *Minneapolis-Honeywell and Automatic Canteen* kill the Second Circuit's view of the *Moss* case that "the mere fact of differential pricing alone made out a prima facie case under section 2 (a) of the act." And although the Committee believes the injury to competition meant by 2 (a) is injury to the market as a whole, the Federal Trade Commission and the Courts may not agree. Especially is this so because "If the Committee is right, Congress was mistaken and did not add anything new" when it passed the Robinson-Patman in 1936. It just repeated what the Clayton Act had been saying "since 1914". On the cost defense, the Committee has not made "any very considerable contribution" but there is "a patch of blue sky" in the Advisory Committee appointed by F. T. C. The Quantity Limits Proviso now under review in the *Firestone* case is what the Committee calls it "a crude form of price fixing by administrative fiat". DeBevoise agrees that the changing conditions exemption should mean "a spontaneous shift in market conditions beyond the seller's control". But if the good faith provision is to be interpreted under a rule of reason as the Committee suggests "independent wholesalers and retailers" fear "it will mark a return to pre-1936 days with the chains and other mass purchasing organizations free again to exact preferential treatment from suppliers". DeBevoise believes the good faith provision should be clarified one way or the other. And he feels the same about the brokerage and discount provisions. And despite *Automatic Canteen,* DeBevoise, unlike the Committee, wants Section 2 (f) clarified with respect to a buyer's liability. DeBevoise agrees that the criminal provisions in Section 3 should be repealed as the treble damage action is penalty enough but he questions whether the validity of functional discounts should be left to interpretative reform, and praises the report's discussion of delivered pricing.

In concluding his discussion, DeBevoise says "there are glaring inconsistencies and conflicts in our antitrust structure" which "the Committee has done its best to smooth over." He then says,

> But I cannot agree that laws which

(Continued on page 187)

(Continued from page 121)

pensation do not apply in automobile accident cases, it seems quite unjustifiable to deprive the victim of this right to recover damages for an injury which may be more serious to him even than his temporary disability itself. Even Professor Young Smith, who advocated the adoption of the Columbia Plan, felt the inequity of this situation and suggested "some allowance for pain and suffering".[31] But the compensationists have a pat answer for this objection, too: "If you don't like it, take out additional insurance." The merits of this answer have been discussed above.

The out-of-state motorist pays *nothing*, even though he caused the accident. A compensation-state motorist pays twice.

The first situation inevitably develops where a motorist from a state which has not adopted a compensation plan, causes an accident in a "compensation state". Since the victim has no right of action for fault (under an "exclusive" plan), he will resort to the compensation fund. The responsible motorist, on the other hand, who has never contributed to the compensation insurance fund, pays nothing unless the plan holds him liable for compensation regardless of fault, even though he has been under no legal obligation to take out compensation insurance. If so, recovery by the victim will again depend on that motorist's financial responsibility. Contrariwise, where a motorist from a compensation state causes an injury in a non-compensation state, he obviously will be exposed to an action in tort, although he thought he had "bought off" that action by his compensation insurance. Hence, this motorist pays twice. The compensationists' answer is: "There must be uniformity!" Those who are familiar with the vicissitudes of uniform laws, the difficulty encountered in their enactment and the diversity of their interpretation, know how much chance of success such an attempt would have.

A number of situations are completely disregarded by the various compensation plans. Their examination would go far beyond the scope of this article. Among them are questions involving compensation in the case of injuries caused by drivers who, contrary to law, remain uninsured, in cases of automobiles colliding with objects or vehicles other than automobiles, thereby causing injury to owners, operators or passengers, injuries resulting from bad road conditions, etc.

Money's No Object . . . *Some Sober Statistics*

"Can we afford it?" When you get to the question of cost, the compensationists get really angry. "Oh no! Not that again!" But, if they must, they come up with some vague figures, refer again to actuarial data which, however, are quite unobtainable, because no one has any basis on which to found an estimate, or refer again to workmen's compensation costs which, as above indicated, would be utterly inapplicable.

However, the Columbia Plan did venture into the field of guessing at the cost of such a compensation scheme. Its estimate was that a compensation plan based on the New York Workmen's Compensation law would cost the policy holders 161 per cent of the cost of liability insurance then prevailing in Massachusetts. In 1929 this would have amounted to $31,120,000. The accuracy of that estimate has been vigorously attacked by competent experts. In 1930 Austin J. Lilly, General Counsel of the Maryland Casualty Company, estimated that, taking into account a modest cost of administration of only 20 per cent, medical, hospital and funeral expenses and a few other factors, such as an increase in claims due to an increased "claim-consciousness" which such plans will inevitably evoke, the loss cost to American motorists with their 25 million motor vehicles then registered, would come to $866,160,000 per annum.[32] But today, with 61 million registered automobiles, a higher rate of injuries and deaths than in 1930, with higher standards to be considered, higher costs of administration and an even greater claim consciousness,[33] those figures would be immeasurably increased beyond any imaginable capacity of motorists to defray the cost. Their only solution would be —"pedestrianism".

Isn't this a logical conclusion if we consider that in 1952 the owner of a private passenger car in New York City who had a young driver in the family paid an annual premium of $288.54 for a liability insurance for bodily injury with $100,000, $300,000 and $5,000 property damage coverage limits? How many motorists could afford a substantial increase over those rates which a compensation insurance would necessarily involve?

Can it be seriously questioned, moreover, that the adoption of a compulsory compensation plan would inevitably lead to state socialism? Even though the compensationists claim that the fund could be administered by private insurance, it is clear that, under the pressure for lower rates, the state would have to take over and the fund would become a state monopoly and a plaything in the political game. We might do well to remember President Eisenhower's statement before the American Medical Association's House of Delegates on March 14, 1953: ". . . I don't like the word 'compulsory.' I am against the word 'socialized.' Everything about such words seems to me to be a step toward the thing that we are spending so many millions of dollars to prevent; that is, the overwhelming of this country by any force, power or idea that leads us to forsake our

31. *Supra* note 8 at 802.

32. Lilly, *supra* note 3, at 22. In 1929, as reported by Mr. Lilly, Charles J. Haugh, Actuary for the National Bureau of Casualty and Surety Underwriters, calculated that the *minimum* cost of compulsory automobile compensation insurance in New York would be $80,351,695 a year, *not* counting assessments for claim adjudication and *not* considering the effect of increased claim frequency or the cost of accidents occurring outside of New York State.

33. It might be noted that according to a communication from the New York Compensation Insurance Rating Board, dated November, 1955, the average cost per workmen's compensation case rose from $287.87 in 1932 to $860.35 in 1952.

traditional system of free enterprise."

The compensationists point with pride to the "smooth operation" of the Saskatchewan Plan, the general features of which were outlined above, and which operates under an exclusive state insurance fund. Again, an analogy is attempted where no analogous problems exist:

(a) It has been estimated that the Ohio Workmen's Compensation Law, for example, provides from two to four times the benefits that the Saskatchewan Plan offers.[34]

(b) The province of Saskatchewan is one of the most thinly populated areas in North America, the number of its people being under 900,000. The number of vehicles in Saskatchewan is estimated at 125,000 to 150,000, with 25 to 30 per cent of them at least 20 years old. In view of the climate, only 42 per cent of the roads are open all winter.[35] What an analogy to draw to conditions prevailing in the State of New York, for example, with a population of 14,830,192 (according to the 1950 census), 4,549,252 registered motor vehicles with 6,157,319 licensed drivers, travelling more than 39,144,000,000 miles during 1954![36] Again, can we make even an intelligent guess as to the cost involved if such a plan were put into operation in this country?

III. The Record

Thus, it is easy to see why the compensation plans have been vigorously opposed and consistently rejected by legislatures, bar associations, individual lawyers, insurance companies and legal writers. Even Arthur Ballantine, the chairman of the committee recommending the Columbia Plan, is reported to have stated to the public press "that he had changed his position; that he no longer believed that the conclusions set forth in the Ballantine report were the answer to this problem . . ."[37] In New York, a public hearing on the Ballantine Report was held by the Judiciary Committee of the 1938 Constitutional Convention, composed of some of our most distinguished judges and leading businessmen. In the huge Assembly Chamber, packed to capacity, many lay organizations opposed the plan. The President of the New York State Grange, speaking for the farmers of the state, pointed out that the cost of such a plan would be so high that no farmer would be able to drive either a pleasure car or a truck. Similar objections were raised by the President of the New York State Automobile Clubs, the President of the State Chamber of Commerce and the Secretary and Treasurer of the Small Business Men's Association of Upstate New York. The plan was rejected by the committee and never reached the floor.

The plan was also before the American Bar Association. The Conference of Bar Delegates to the Fifty-Seventh Annual Meeting of the American Bar Association in Milwaukee, Wisconsin, on August 29, 1934, under the chairmanship of Robert H. Jackson, considered the report of a Special Committee on Accident Litigation. Its chairman, Henry S. Drinker, Jr., who had been a member of the committee which prepared the Columbia Plan, advocated the adoption of the plan. Faced by strong opposition, led by Howard D. Bailey, the Conference, after thorough consideration, voted "overwhelmingly against the recommendation of the Chairman of the committee in favor of compensation plan."[38]

We have already referred to the opposition to compensation plans expressed by the State of New York, Insurance Department.[39]

Numerous bar associations likewise rejected the plans as unfair, too costly and impractical. Thus, under the chairmanship of James B. Donovan, the Committee on Insurance Law of The Association of the Bar of the City of New York in its report to the meeting of that Association on December 9, 1952, concluded, for specific reasons stated in its report, that "there does not exist substantial reason in the field of automobile accidents for the abandonment of the basic theory of liability based upon fault and the substitution of expanding administrative bodies for the courts".[40]

On March 3, 1955, the Justices of the Appellate Division of the Supreme Court of New York, First Department, published "A Statement to the Citizens of New York City" dealing with court problems. With reference to the compensation plans the statement contains these words: "Perhaps because we are judges and lawyers, we are not yet persuaded to embrace this system of slide rule justice. Fault is still a fair and just consideration in the determination of liability and a person injured wholly through the fault of another should not be limited in his recovery of damages to something less than his full loss." While conceding that compensation systems should be given consideration against the perpetuation of long delays, the judges recommend remedies directed toward an improvement of the court system rather than the elimination of negligence cases from the courts.

We are a nation committed to the principles of democracy. Hence, the ultimate question is: "what do the people want?" In 1930 the popular reaction was forecast in these words: "In my humble opinion, if the motorists of the United States—if the automotive interests in the United States—are burdened with an additional overhead of approximately nine hundred millions of dollars per annum, there will indeed be wrath instead of balm in Gilead; and from the standpoint of economic loss and cost, our last state will be worse than our first."[41]

More recently, the voters of this

34. See McVay, *supra* note 15, at 164.
35. *Ibid.*, 164, 165.
36. State of New York Bureau of Motor Vehicles, NEW YORK SAFETY RESPONSIBILITY ANNUAL REPORT 2 (1954).
37. Donovan, *Our Association's Program to Aid Victims of Financially Irresponsible Motorists*, 25 NEW YORK STATE BAR ASSOCIATION BULLETIN 302, 309 (1953).
38. 59 A.B.A.Rep. 61 (1934).
39. *The Problem of the Uninsured Motorist* 51 (1951), *supra* note 28.
40. Association of the Bar of the City of New York, REPORT ON PROBLEM CREATED BY FINANCIALLY IRRESPONSIBLE MOTORISTS 10 (1952). See also, Address by Crandall Melvin at the Mid-Summer Meeting of the New York State Bar Association at Saranac Inn, N. Y., July 1, 1938.
41. Lilly, *supra* note 3, at 22, 23.

country have spoken unmistakably in the last November balloting. Their reaction has been well summarized in these words: "It [the direct evidence] shows a revolt, above all, against the constant increase of government spending . . . The voters overwhelmingly rejected a proposal to increase the state's [Ohio's] unemployment compensation benefits . . . The votes of many factory workers, including rank-and-file CIO members themselves, must have been against this proposal to bring about such a defeat." The author also points out: "Over the country as a whole, the balloting resulted in the defeat of 75 per cent of the bond issues proposed to finance road building and other projects. This reversed the pattern of recent years in which the voters have ratified an average of 85 per cent of the bond issues submitted to them."[42]

IV. The Remedy

It would be quite erroneous to infer from what has been said that the writers suggest that "all is well" and that we should complacently sit back and do nothing. On the contrary, we maintain that vigorous action is necessary both to reduce the toll of deaths and injuries caused by automobiles and to facilitate the recovery of adequate damages by the victims of such accidents.

However, if our endeavors are to have direction, as they must, we ought to establish a point of departure, and to that end determine:

1. The extent of the evil to be remedied, and

2. The therapy to be applied.

The American motorists have been publicly pilloried as arch sinners, as killers of men, women and children on a scale equivalent to mass slaughter. Therefore, it seems only fair to look at their record and to see to what extent they deserve such a wholesale condemnation.

In 1954, out of 72,200,000 licensed drivers in the United States[43] 43,000 or .06 per cent were involved in fatal accidents and 1,350,000, or 1.9 per cent were involved in non-fatal accidents.[44] This means that out of the total of licensed drivers in the entire country, 1.9 per cent were involved in accidents causing death or bodily injury. To be sure, such a record must be improved, the toll must be drastically cut down. But does this record justify the branding of the innocent operators of the "remaining" 98.1 per cent of all motor vehicles as "killers" who must be held liable for the injuries caused by the 1.9 per cent? Is this record really so damnable if we consider that those 58 million vehicles and their 72,200,000 drivers traveled 560 billion miles in 1954? It seems that American motorists succeeded in avoiding a good many of those "inevitable" accidents, even though doubtless more should have been avoided.

The financially irresponsible motorist is undoubtedly a menace on the roads of our country. But the harm done by him has been exaggerated beyond all proportion. It was easy to do that, because the term "financial irresponsibility" has a strong emotional appeal and is a cloak broad enough to cover up a good number of chinks in the armor. Let us examine some of those gaps, by reducing generalities to figures in the State of New York, which, after all, has the odious privilege of being the state with the fourth largest number of deaths caused by motor vehicles in 1954.

Using the figures published by the New York Bureau of Motor Vehicles for 1952, Henry S. Moser, General Counsel of the Allstate Insurance Company, discloses[45] that of the 160,000 people injured as a result of motor vehicle accidents in that year, less than 50,000 suffered injuries of a serious nature while 2,100 people were killed. Since the Bureau of Motor Vehicles reported that more than 96 per cent of accident participants were then insured (the figure for 1954 is given as 96.08 per cent), 4 per cent of motorists involved in accidents were uninsured. Thus, it may be assumed that there was no liability insurance in approximately only eighty cases where the accident resulted in deaths, and only 2,000 cases where serious injuries were suffered (the number is proportionately smaller for 1954, because of a reduction of the death and injury rate and the increase of the number of insured motorists, as indicated above).

As Mr. Moser also points out, not all motor vehicle accidents in which financially irresponsible motorists are involved entail legal liability. For example, the same report indicates that 26 per cent of the accidents in which people were killed and 15 per cent of those in which people were injured occurred in upsets or in collisions with fixed objects, where liability usually does not exist.

Finally, it must be remembered that not all uninsured motorists are financially irresponsible. In 1954, for example, security deposits under the New York Safety Responsibility Law numbered 5,815 with amounts totalling $1,248,536. In addition, 21,248 releases were filed with the Bureau of Motor Vehicles.[46]

In order to obtain a clear picture, we cannot forget that, even where there is liability on the part of the financially irresponsible motorist, the victim by no means always remains uncompensated. Such payments are received through workmen's compensation, personal and group accident insurance, hospitalization insurance (Blue Cross), Blue Shield, the various insurance plans sponsored by labor unions, etc. Mr. Moser, in the above cited article, refers to a report of the New York Health Insurance Council for 1952 which discloses that in New York State "11,300,000 persons were protected by Hospitalization Insurance, 8,500,000 against surgical expenses and nearly 4,000,000 against medical expense."

Recently, the insurance compa-

42. Hazlitt, *Revolt Against Spending*, NEWSWEEK, November 21, 1955 page 95.

43. ACCIDENT FACTS 1955, *supra* note 24, at page 43. The number of registered motor vehicles in the United States in 1954 is there given as 57,900,000. However, according to Best's Weekly News Digest, Fire and Casualty, October 24, 1955, that number now stands at 61,000,000.

44. *Id.*

45. *The Financially Irresponsible Motorist*, 25 NEW YORK STATE BAR BULLETIN 326 (1953).

46. *Supra*, note 36.

nies have taken steps toward alleviating the harm done by the uninsured motorist. They have extended without charge all automobile liability policies to cover bodily injury to an insured caused by the negligence of any uninsured motorist in limits of $10,000 for each person, subject to a maximum of $20,000 per accident. The new coverage also extends to guests of the insured and to the insured and members of his family as pedestrians. A small additional premium will be charged on renewals after November 15, 1955.

The Therapeutic Action . . . *For Maximum Relief*

Having thus reduced the problem to its proper proportions, we may now briefly consider the therapeutic action taken and to be taken, in order to provide maximum relief. Unfortunately, space limitations will permit us little more than to list some of those measures, leaving a more careful evaluation to other publications.

Financial responsibility laws have been enacted in forty-four states. While different in detail, they all require security and proof of responsibility from a motorist involved in an accident. If such proof is not supplied, the motorist's driver's license and registration are suspended. To illustrate only some of the results of such laws: It is reported that in Ohio, between March 1, 1953, when the law took effect, and January 15, 1954, $209,010.20 were received as security deposits, while 4,778 driver's licenses and registrations were revoked. In New York, where prior to the enactment of the Financial Responsibility Law less than 30 per cent of all cars were insured, the figure now stands at 96.08 per cent, while in New Hampshire the law had the effect of raising the number of insured cars from 36 to approximately 85 per cent. Thus this type of law certainly operates toward inducing motorists to insure.

The enactment of impoundment laws has been suggested, providing for impoundment of motor vehicles involved in certain types of accidents in the absence of financial responsibility. This type of law would serve as an additional stimulus for motorists to insure themselves.

Unsatisfied judgment fund statutes have been tried, such as those enacted in New Jersey or North Dakota.[47]

Court congestion constitutes one of the main arguments of the compensationists in favor of their respective plans. But they do not concentrate on relieving such congestion. Instead, they advocate amputation in place of treatment. Since New York City is considered the worst congested-court area, especially with respect to cases in the Supreme Court, our remarks will be directed to that situation, even though court congestion exists in other densely populated centers, such as Boston, Chicago and others.

Court calendars are overcrowded, even if we bear in mind "that approximately 95 per cent of all personal injury and death actions brought in all of the courts of New York State are disposed of by settlement and that no more than 5 per cent are tried to conclusion".[48]

The various causes contributing to this unfortunate situation have been discussed by a number of legal scholars, judges, commissions, etc.[49] We shall list only a few:

(a) The bringing of actions in the Supreme Court which do not belong there. A report of the Committee on Calendar Congestion, under the chairmanship of Justice David W. Peck, submitted in 1952 found that between 50 and 60 per cent of all Supreme Court suits were settled within $1,000, while 40 per cent were settled under $500, and 75 to 85 per cent were settled for less than $3,000, the present limit of Municipal Court jurisdiction. Only 5 per cent were settled for an amount exceeding $6,000, the present jurisdictional limit of the New York City Court.[50] A proper evaluation of their clients' claims by the attorneys would have resulted in bringing the action in the proper court or in a settlement without court intervention.

(b) Delay in settling cases until the eve of the trial. A vigorous attack on this problem by the negligence Bar would doubtless remedy the situation.

(c) Insufficiency of the judicial manpower. In spite of the increase in population and in the number of motor vehicles, the number of judges in the Supreme Court in the counties of New York and the Bronx has remained substantially the same since 1936. In Brooklyn, there has been no increase in the number of judges in the last twenty-four years. A similar situation exists in Queens and in some of the metropolitan centers upstate. The Temporary Commission on the Courts has recommended the appointment of additional Supreme Court justices in its 1955 Report.[51]

Vigorous efforts at improvement have been made and continue to be made. Other devices are now under consideration. Among the remedies which have already been put into operation and which are being expanded are, for example:

(a) Temporary inter-court assignment of judges in the City of New York, in effect since January 1, 1954. Under this plan County, General Sessions and City Court judges are assigned to the Supreme Court and, similarly, Special Sessions and Municipal Court judges are assigned to the City Court.

(b) Pre-trial conferences. This device has been eminently successful, especially in Kings County and Queens, where, as a result of so-called "mass" pre-trials, 8,223 and 3,349 jury cases respectively were disposed of between July 1, 1953, and June 30, 1954.[52] Similarly, in 1950-51 of about 5,000 cases pre-tried in

47. For some additional details regarding such statutes, see McVay, *supra* note 16, at 150, 151; Association of the Bar of the City of New York, *supra* note 40, at 3-18; McNiece and Thornton, *supra* note 20, at 605-608.

48. 1955 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK 26.

49. See *e. g.*: McNiece and Thornton, *supra* number 20, at 597-603; Benson, *Let's Get Together*, 26 NEW YORK STATE BAR BULLETIN 300 (1954); *supra* note 48, etc.

50. Cited by Benson, *supra* note 49.

51. *Supra* note 48, at page 39.

52. TWENTY-FIRST ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, 86 (Table 5) (1955).

the Supreme Court in New York County, 40 per cent were settled and 4 per cent transferred to lower courts.[53]

(c) Increasing the number of cases tried without juries, an area in which the Bar can make a monumental contribution.

The real cure must, of course, be applied to the source of the evil. Accident prevention is a remedy by far superior to any type of accident compensation. It has been estimated that one fifth of the drivers cause four fifths of the accidents. Let's concentrate on that one fifth and cure them or eliminate them from the roads. Among remedies aimed at accident prevention various measures have been suggested, such as the adoption of comprehensive visual tests, the improvement of driving tests, examination of accident-prone drivers, stronger legal sanctions against repeated offenders, extension of safety programs, etc.[54]

We are not willing to embrace the philosophy of "pedestrianism". Ours is a solid House of Law. True, the storms it has so steadfastly withstood have loosened some shingles of its roof. Let's nail them down. But its underpinnings are firm. Let's not destroy it and build, instead, a flimsy structure on the shifting sands of compensationist Utopia.

53. For details regarding causes of court congestion in New York and remedies adopted and recommended, see *supra* note 48.

54. See McNiece and Thornton, *supra* note 20.

Law Magazines

(Continued from page 182)

> are said to need so much interpretive reform should be left as they are. Nor can I agree that interpretative reforms suggested by lawyers and economists should be substituted for a clearer legislative restatement of such antitrust controls as our people believe necessary to the continuing prosperity of our distributive economy. [page 1092].

Bartholomew Diggins, of the District of Columbia Bar, writes the Michigan Symposium piece on patents, "The Patent Antitrust Problem" (pages 1093-1118). Mr. Diggins is frank to admit that his approach to patent-antitrust differs from the concepts of the Committee. He does not believe there is a problem; rather, patent-antitrust cases define the line at which one steps outside the protection of the patent laws into the prohibitions of the antitrust laws. Nevertheless, the writer discusses the committee report as an invaluable handbook on such topics as the nature of the patent right, acquisition, non-use, individual license limitations, multiple license limitations, cross licenses, pools or interchanges, infringement suits, the misuse defense and remedies.

Professor Russell A. Smith, of Michigan's own faculty, writes the piece on labor which rumor has it gave the Committee its biggest headache ("Antitrust and Labor", pages 1119-1132). Professor Smith notes with favor the Committee's decision that its scope of inquiry was limited in the labor field to those union activities which were aimed at direct restraints on commercial competition. The article gives a thoughtful survey and analysis of the case law and statutory provisions as developed by the Committee in this area. In writing of the Committee's recommended legislation to control specific union activities, Professor Smith stresses the potential danger resulting from legislation with general language; but he also recognizes the useful function of the Committee in demonstrating areas of uncertainty in the law.

John T. Caldwell, of the Illinois Bar, writes the final piece in this grand Michigan symposium and a fine, interesting piece it is ("Antitrust Administration and Enforcement" pages 1133-1152). Mr. Caldwell objects to the proposal of the Committee to give to the Antitrust Division of the Department of Justice a limited subpoena power in civil cases, called the "Civil Investigative Demand". If the purpose is to make the Attorney General stop using the grand jury to investigate, Mr. Caldwell would prefer that it be corrected by legislation "directly dealing with the problem". And he states,

> The Committee might well have recommended the outright abolition of the criminal prosecution as an outmoded device for modern business regulation.

Mr. Caldwell also discusses the bill then pending to increase fines to $50,000, and favored the Committee suggestion raising fines to $10,000. Perhaps the best part of Mr. Caldwell's article is his discussion of the Federal Trade Commission. He says:

> The Report is unaccountably brief with respect to F.T.C. activities. . . . It is interesting to note that shortly after release of the Committee report, another agency, the Hoover Commission, issued a report calling for a complete separation of the prosecuting and adjudication functions of the Federal Trade Commission. . . . The Hoover Report proposes the creation of a new "Administrative Court of the United States" to be composed of a Tax Section, a Trade and a Labor Section, to take over the decisional functions now exercised by federal agencies operating within the indicated fields. . . . there are a number of conflicting considerations inherent in this important proposal which cannot be discussed in this article and it is unfortunate that the distinguished group of antitrust lawyers comprising the Attorney General's Committee did not address themselves to this difficult and vital question. [pages 1147-8].

In conclusion Mr. Caldwell states "in the main the Report offers a blueprint for substantial increase in the effectiveness and fairness of antitrust administration" (page 1152).

(Continued from page 129)
now the Lieutenant General Commanding the Army, disapproved the request. One gets a very clear impression from the Army's annual reports that General Sherman did not take too kindly toward judge advocates generally. Only a few years earlier he had written, with seemingly ill-concealed pleasure, that the Bureau of Military Justice then consisted of one brigadier general and four majors, "which seems as small as possible". In 1883 there was a total of nine J.A. officers, of whom four or five were in the field and the rest in Washington. Several of the major departments were without a judge advocate's services, and when Winthrop went on leave to Washington in late 1885 he left the entire West sans military counsel.

Two important events occurred before Winthrop took that leave, however. The most important one was the difficulty into which Judge Advocate General Swaim had fallen, and the second was Winthrop's promotion to lieutenant colonel.

On April 22, 1884, Secretary of War Robert T. Lincoln informed President Arthur that General Swaim had committed a fraud upon a Washington banker, A. E. Bateman. A court of inquiry shortly thereafter rendered a finding against General Swaim and brought forth the appointment by the President of a general court martial for his trial. Major General Schofield was President of the court, which included the Chief of Engineers, the Paymaster General, the Surgeon General, the Quartermaster General, Brigadier General Terry and six regimental commanders. Major Asa B. Gardiner was the trial judge advocate, while General Swaim was defended by Judge Shellabarger and General Charles H. Grosvenor, of Ohio.

With the Judge Advocate General *hors de combat*, so to speak, it was necessary that some changes be made in the Bureau of Military Justice in order that it might continue its work. On July 5, 1884, G. Norman Lieber, of New York, Winthrop's senior by two years, assumed the post of Acting Judge Advocate General, a position he was to hold on a temporary basis for the next ten years. With Lieber's promotion came Winthrop's appointment as Deputy Judge Advocate General with rank of lieutenant colonel. He had been in grade for about seventeen years!

Lieber had been one of the officers originally integrated with Winthrop in 1867, and was also one of the original thirty-three called to the Judge Advocate General's office in 1863. His father, the renowned German-born Professor Francis Lieber, wrote the celebrated General Order 100 of 1863, which became the forerunner of the rules of land warfare, and the son followed the father's footsteps as a scholar of law with only slightly less distinction.

On February 24, 1885, the court martial in General Swaim's case rendered its verdict—guilty of conduct to the prejudice of good order and discipline, to be suspended from rank, duty and pay for three years.

President Arthur sent the record of trial to Attorney General B. H. Brewster, and upon his recommendation returned it to the court for reconsideration of its sentence. The court did reconsider, and announced a new sentence of suspension from rank and duty for one year, with forfeiture of pay for one year and reduction in grade to Major, J.A.G.D. This sentence, too, displeased the President, and once again the record was returned to the court for reconsideration. Finally, the third attempt at a sentence—suspension from rank and duty for twelve years and forfeiture of one-half pay for the same period—was resignedly approved by the President, and the legal adviser to the Secretary of War and the fifteenth ranking officer in the U.S. Army was thus "temporarily" relieved from active duty. General Swaim, naturally enough, did not let the matter rest there, but continued to fight his case, unsuccessfully, through the Court of Claims to the U.S. Supreme Court.[9] The fact of his suspension effectively prevented Acting Judge Advocate General Lieber from acquiring the ornaments of a brigadier general until 1895—some ten years later.

President Arthur had finally acted in General Swaim's case just about one week before he relinquished the White House to Grover Cleveland, of New Jersey, the former Governor of New York and the first Democratic President since before the Civil War.

Meanwhile, Lieutenant Colonel and Deputy J.A.G. Winthrop was still on the West Coast, living in San Rafael, California, across the bay to the north from the Presidio of San Francisco. Residents of the bay area may well wonder how he was able to commute to work in those days before the Golden Gate bridge or even an efficient train and ferry system! Duty hours may have been somewhat more flexible in those days than at present.

Judge Advocate General Lieber not unnaturally wanted Winthrop back in Washington for duty, and as early as July, 1885, he made a formal request for his transfer. General Schofield also renewed his request for Winthrop at this time to come to Chicago, but again he was denied. No action was taken to transfer Winthrop to the East so he decided upon a leave of three months—his undisclosed purpose being to present his now completed book to his publishers.

As an indication of the intimacy enjoyed by the professional soldiers of that long-gone day, there is an intriguing telegram in Winthrop's 201 file, now gathering cob-webs in the National Archives. The telegram is from General Pope, the commanding general of the Department of the Pacific, to The Adjutant General in Washington explaining that Winthrop was having some trouble getting away from California at the time because he had to find a tenant for his home in San Rafael!

Winthrop, in Washington on leave by the fall of 1885, found his three months' leave insufficient to put the final touches on his book. It was necessary to request an extension, and so, at last, he had to reveal his project. The Secretary of War

9. 28 Ct. Cl. 173 (1893); 165 U.S. 553, 41 L. ed 823, 17 S. Ct. 448 (1897).

seemed not to be disposed to grant the extension and had querulously wondered at Winthrop's delay in returning to California, even taking the trouble to make a personal call upon the lieutenant colonel in order to inquire into the matter.

On November 10, Winthrop wrote a long personal letter to Mr. Endicott, the Secretary of War, wherein he apologized for not being at home when the Secretary called. He proceeded to explain the necessity for the extension and mentioned that he had been at work for ten years preparing his book on military law, now in two volumes. He said that it was then in the hands of the printer, W. H. Morrison, a law publisher in Washington, and that the job of correcting proofs was under way. At least two more months would be necessary to complete that task, and so Winthrop expected that he would have to go on half pay for that time, since it exceeded that authorized leave time available to him. Then he said: "But especially in view of the embarrassing, and to me humiliating, state of my department of the Army consequent upon the trial and sentence of its official head, my literary work is now the only means by which I can add to my reputation or record as an officer or perform satisfactory public service of a valuable and permanent character. . . . My object in the extended work prepared by me is to supply to the body of the public law of the United States a contribution never yet made."

The manuscript of this great work was now completed, and within very few weeks—even before it officially appeared for publication—it earned its first judicial notice, being cited by Justice Gray in the U. S. Supreme Court case of *Smith* v. *Whitney*.[10]

A Request for Transfer . . . To the Military Academy

His work on the book in Washington completed, Winthrop then returned to San Francisco, but immediately began action to effect a transfer to the East. Californians, especially San Franciscans, will be chagrined to learn that Winthrop's stated reason for requesting his transfer was that Mrs. Winthrop could not stand the climate of the region and because of her health it was necessary to make the change of station. And General Pope concurred in the request! In August, 1886, the Winthrops departed California for the East. Although the staff in Washington was shorthanded and had been operating without its Deputy J.A.G. to the distress of Judge Advocate General Lieber, when Winthrop received his new assignment it was to West Point as professor of law, rather than to the Bureau in Washington. The publication of Winthrop's book might have been the reason for this apparent change of plans for it must have been clear by then that he was markedly a student of military law.

The life of a pedagogue seems to have been most agreeable to Winthrop. At West Point he promptly went to work on an *Abridgment of Military Law* which came out in its first edition in 1887, designed for use at the academy and for officer's promotion examination. And the American Bar Association elected him to membership in 1886, a relationship he continued until 1890.

He was also able to take several long leaves during this period, one of them being to Europe. On that one he tried to cut his time rather short and when his steamer lay in the New York harbor, fogbound, for one night on his return, he found it necessary to make an official explanation for his one day unauthorized absence. There is no record of any disciplinary action having been taken.

The tour of duty of four academic years came to an end for Winthrop in May, 1890, a few months before the commencement of the football rivalry between Army and Navy. Even here, it seems, poor Winthrop had managed to miss out on one of the important rewards of duty at the Academy.

Now, back on duty in Washington once more, Winthrop assumed the functions of a Deputy to Judge Advocate General Lieber. Lieber was hardly overly liberal in rating his assistant, however, for we find that on a scale reading, from top to bottom, "Excellent", "Very Good", "Good", "Tolerable", "Indifferent", and "Bad", Winthrop could earn no better than "Good" in professional ability. *Sic semper* efficiency reports!

The *Abridgment of Military Law* was brought up to date and a second edition published by Winthrop in 1893, the year Grover Cleveland came back to the White House after Republican Benjamin Harrison had had one term. In March of 1894, Winthrop prepared an article entitled "The Declaration of Paris of 1856 and the United States" for publication in 3 *Yale Law Journal*.

Later that year President Cleveland remitted the unexecuted portion of General Swaim's sentence and he was permitted to retire. The way was now open for the appointment of a brigadier general as the Judge Advocate General, and Winthrop, with retirement close upon him, was a candidate for the job. On December 8, 1894, Judge M. F. Morris, Associate Justice of the Court of Appeals of the District of Columbia, wrote to the President suggesting Winthrop as the Judge Advocate General. Governor Hoadly, a cousin of Winthrop, had seconded the recommendation. President Cleveland, however, undoubtedly motivated by a desire to reward the man who for so long had shouldered the responsibilities of the Judge Advocate General without the rank that should have gone with them, promoted G. Norman Lieber to the rank of brigadier general and to the post as T.J.A.G. Winthrop was promoted to Colonel and Assistant T.J.A.G. on January 23, 1895, after almost thirty-four years of service. Winthrop remembered the support Judge Morris had given him by dedicating *Military Law and Precedent* to him.

The sands were running out now, and on August 3, 1895, Winthrop

10. 116 U.S. 167, 29 L. ed. 601, 6 S. Ct. 570 (1886).

was retired from the Army in the grade of colonel. He had failed to earn his star—he had failed to become The Judge Advocate General! There can be little doubt that he was disappointed. The now-defunct practice of promoting worthy candidates to brigadier general with appointment as T.J.A.G. for only one or two days just before retirement was not invoked until six years later, after General Lieber had retired—and Winthrop was dead when that happened.

At the time of Colonel Winthrop's retirement in 1895 the Army totaled about 30,000 officers and men. This figure had been fairly constant following the deactivation of the Grand Army of the Republic, and yet it was estimated that at one time in the 70's this small force opposed about 200,000 hostile Indians. Since the end of the Civil War the Army had been grossly undermanned for the functions assigned to it. And the responsibilities heaped upon its officers, most of whom were often required to spend years in barren, forsaken posts while serving in junior grades for what must have seemed like an eternity, were of the first magnitude. The nation will probably never fully appreciate the value of the services rendered it during these years by its small professional Army. Certainly in the present day there must be some amazement at the achievements of those men, not the least of whom was Colonel Winthrop. His cup of frustration, bitterness and disappointment was not yet filled, however.

In the years that followed the publication of *Military Law*, Winthrop had devoted himself to its complete annotation and modernization. Shortly after he retired his new product was ready for the press. This was to be called *Military Law and Precedents* and is the volume that has come to be so well known. This edition was published by Little, Brown and Company of Boston, and the publishers had inquired of the Army and the Navy of the number of copies each service would expect to order. The Navy indicated it could use forty or forty-five copies of the book, a small enough figure, but to the utter consternation of Colonel Winthrop, a letter from Major J. N. Morrison, Assistant in the Office of The Judge Advocate General was received, stating that *no* copies of Winthrop's book would be ordered by the Army! Winthrop wrote to Daniel S. Lamont, then Secretary of War, that " . . . This notification has profoundly surprised me. . . . Some $2000 was expended by me for the electrotype plates. With this statement I desire most respectfully to protest against the action as reported of the Judge Advocate General. The reasons upon which such action was based are of course unknown to me. In a few instances in the work I have differed from views of the law expressed by the Judge Advocate General. I have also in a few instances criticized Articles of War, orders, or regulations, and suggested amendments thereof. . . . I have therefore the honor to invoke consideration by the Secretary of War of the subject of this communication. . . . "

Two weeks later General Lieber wrote to the Secretary stating that the matter had not come to his attention before, that he had made no recommendation and that he had not yet seen the work. He did not propose to recommend purchase, however, because the "Army had already been supplied with the first edition of the work and that it is unnecessary that it should be supplied with the second, and further, that now for the first time an authoritative manual for courts-martial procedure has been issued and that it is highly desirable that the rules found and prescribed in it should be adhered to. The manual for courts-martial was not issued until Colonel Winthrop's book had gone to press so that he cannot have adapted his book to the practice thus established. . . . "

That General Lieber may have been led astray, by reasons at which we may only guess, is more than abundantly proved by the fact that in 1920 and 1942 Colonel Winthrop's book was reprinted at Government expense.

There were mighty few honors for Colonel Winthrop during his lifetime, but it is of interest to note that Georgetown University saw fit to award him an honorary degree of Doctor of Laws in 1896.

The international situation became tense in 1898, and hostilities with Spain brought the United States into war after more than thirty years of relative peace. Winthrop is known to have contributed two articles at this time, both for the magazine *Outlook*. The first article, released in July, dealt with Puerto Rico and the capture of San Juan, and the second, published in December, discussed the treaty of Paris by which Spain ceded the Philippines and Puerto Rico to the United States.

Four months later Winthrop was dead. On April 8, 1899, while vacationing at the Luray Hotel in Atlantic City, New Jersey, he died suddenly of a heart attack. On the next day The Adjutant General heard of his death informally and inquired of the Judge Advocate General but was able to learn nothing—Winthrop had apparently not been in close contact with J.A.G.O. The *Washington Evening Star* of April 10 carried a brief story about Winthrop's passing, somehow contriving to omit any mention of his famous book. Even in his death, Winthrop had been overshadowed by events outside of his control, for on April 9, Justice Stephen J. Field had expired in Washington and the papers were filled with material concerning that colorful judge who had established the record for the longest term on the Supreme Court. Winthrop's death notice appeared in a small column on an inside page, near an advertisement for Woodward and Lothrop, a Washington department store. The end of the notice asked the New York, Boston, Philadelphia, and Baltimore papers to please copy.

Winthrop's body was returned from Atlantic City to his home at

1620 I Street, N.W., Washington, a building now housing law offices, just a short walk from the White House. The plans to inter him in the Oak Hill Cemetery in Georgetown were altered, however, and on April 14 he was buried in the Rock Creek Cemetery in Washington. The following year, on October 5, Winthrop's wife, Alice, was buried alongside him in the same cemetery.

The nineteenth century had ended, and with it had passed a great American legal scholar. But it was not until after his death that his work commenced to gain its deserved recognition. A Minnesota Supreme Court had quoted from Winthrop in 1898 in *State ex rel. Madigan* v. *Wagener*,[11] and a Federal Circuit Court in Nebraska cited it in 1900 in *Re Fair*.[12] Chief Justice Fuller of the U. S. Supreme Court quoted extensively from *Military Law and Precedents* in *Carter* v. *McClaughry*[13] in 1902 and with the outbreak of World War II that Court had occasion to refer to Winthrop frequently in such famous cases as *Ex parte Quirin*[14] and *Re Yamashita*,[15] by Chief Justice Stone; *United States ex rel. Hirshberg* v. *Cooke*,[16] by Justice Black; *Welchel* v. *McDonald*[17] by Justice Douglas; *Madsen* v. *Kinsella*[18] by Justice Burton; and by Justices Black and Reed in *United States ex rel. Toth* v. *Quarles*[19]. The list of decisions by other courts citing Winthrop is far too long to include here. Naturally enough, when the new United States Court of Military Appeals rendered its first opinion in 1951 in the case of *United States* v. *McCrary*[20] it cited Winthrop, a practice that has been continued extensively in a great many subsequent opinions by that court.

Thus came about Winthrop's monument of legal literature. The product of the student and the dedicated public servant, a man whose career contrasts with the sensational headlines of the times in which he lived, it reflects the great maturity achieved by America during that period. This outstanding contribution to American law has well earned the plaudits of the American Bench and Bar and serves as a perfect example for the military lawyers who follow in the traditions of such men as Colonel William Winthrop.

11. 74 Minn. 518, 77 N.W. 424, 42 LRA 749, 73 Am. St. Rep. 369 (1898).
12. (C.C. Neb.) 100 Fed. 149 (1900).
13. 183 U.S. 365, 46 L. ed. 236, 22 S. Ct. 181 (1902).
14. 317 U.S. 1, 87 L. ed. 3, 63 S. Ct. 2 (1942).
15. 327 U.S. 1, 90 L. ed. 499, 66 S. Ct. 340 (1946).
16. 336 U.S. 210, 93 L. ed. 621, 69 S. Ct. 530. (1949).
17. 340 U.S. 122, 95 L. ed. 141, 71 S. Ct. 146 (1950).
18. 343 U.S. 341, 96 L. ed. 988, 72 S. Ct. 699 (1952).
19. 24 U.S. Law Week 4005 (decided November 7, 1955).
20. 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951). (No. 4).

(Continued from page 147)

Professor Albert P. Blaustein, in his article in the *Journal of the American Judicature Society,* issue of April, 1950, Volume 33 at page 173, points out that the real percentages for group practice by states are as follows:

State	Per Cent Practicing in Firms
Iowa	37.9
Kansas	34.8
Louisiana	34.0
Alabama	33.5
Arizona	32.8
Wisconsin	31.8
Nebraska	31.5
New York	24.1
Pennsylvania	22.1
Massachusetts	17.0

It is now time for us to return to the problems of the present day as they are defined by leaders of the Bar.

Reference has earlier been made to the remarkable series of lectures on law office organization at the University of Illinois Law School in November, 1954. Speaking there on "The Changed Order of the Client-Lawyer Relationship", Morris I. Leibman said (see *Illinois Bar Journal* for February, 1955, at page 399):

> I suggest too, that our failure to recognize the developments of the past has led to the demise of the general practitioner. He has failed to keep up with the times and one aspect of this is that non-lawyers are operating in fields which were traditionally reserved for lawyers.
>
> But I submit that this phenomenon is not so much a case of usurpation by non-lawyers as it is a case of default by lawyers.

The President of the American Bar Association, E. Smythe Gambrell, in his President's Page in the November, 1955, issue of AMERICAN BAR ASSOCIATION JOURNAL, Vol. 41 at page 987, wrote:

> How well are we as a profession keeping abreast of the times, how seriously are we considering the convenience, tastes and growing needs of the public?
>
> The time has come for self-evaluation, even though it takes real heroism to see one's own equation written out.
>
> We would do well to remember that we have no divine right to practice law—that centuries ago our profession was created to meet social needs, that society can and should eliminate us if, in character or in competency or in the convenient availability of our services, we fail to measure up to what is expected of us.

Retrospect

Having passed my sixty-fifth birthday, I have resigned as managing partner of my firm. I shall continue in active practice chiefly because I want to and partly because I must. This is relevant only because the "rugged individualism" of lawyers seems to be the reason why I, as a lawyer, cannot have the benefit of social security or a pension-retirement plan such as now helps my college classmates, the faithful ladies in my own firm, and my many friends in the legal departments of business enterprises.

From now on, instead of being a partner who manages, I shall be one of the members of the firm who is managed. This will be a new point of view.

It is repeatedly said that the pitcher is almost always a poor batter because he is used to watching the baseball move away from him so that it is hard for him standing in the batter's box to appraise the ball that is so swiftly moving towards him.

The change in my position may also affect my vision. That I cannot tell; but I do know that the whole subject of law office organization interests me so much and seems so important that I shall continue its study.

If I should reach conclusions that might be of interest to our profession I shall "a little later on" submit them to the JOURNAL and hope for the best.

The Use of Forms in Tax Planning

(Continued from page 140)

But it is created with the understanding that it will be suppressed or destroyed so that the required conduct will appear as having been taken voluntarily. Since the Government is a beneficiary of every transaction which may involve taxes, it is a plain deception if the documents made available to it do not fairly reflect that transaction. The responsibility of the tax adviser is clear. It generally takes little effort to convince a taxpayer that the Government should not be put aside by a side agreement. And in many instances a little creative effort can frequently result in the development of an alternative course which can be fully disclosed with confidence.

Local Forms and Local Law

All of this suggests that it is not always safe for the draftsman to carry into the tax law the attitude toward legal documents developed in the older fields of law. Nor is it always safe to carry into the tax law skills of draftsmanship learned in other specialized areas. A good repair and restoration clause in a lease drawn for a landlord must be imported into the tax field with caution. It may result in the denial to the landlord of the depreciation deduction.[28] Conversely, a good renewal option clause for a tenant may result in an extension of the period over which the tenant's costs of improvements are to be depreciated.[29] The enumeration of unnecessary powers in a business or investment trust may be harmless for most purposes, but may be the basis for treating the trust as an association taxable as a corporation.[30] And most of the litigation over the issue of whether a patent has been sold or merely licensed, which makes the difference between capital gain or ordinary income, has stemmed from the use of old-line clauses which were not tested in advance for tax consequences.[31]

28. G. C. M. 11933, XII-2 C. B. 52.

29. *Union Electric Co. of Missouri* v. *Comm.*, 177 F. 2d 269 (8th Cir. 1949), *affirming*, 10 T. C. 802 (1948); *Alamo Broadcasting Co.*, 15 T. C. 534 (1950); *Hens & Kelly, Inc.*, 19 T. C. 305 (1952).

30. See *Helvering* v. *Coleman-Gilbert Associates*, 296 U. S. 369 (1935); Reg. 118, §39.3797-2.

31. *Broderick* v. *Neale*, 201 F. 2d 621 (10th Cir. 1953); *Eterpen Financiera Sociedad* v. *U. S.*, 108 F. Supp. 100 (Ct. Cl. 1952), *cert. denied*, 346 U. S. 813 (1953); *Lamar* v. *Granger*, 99 F. Supp. 17 (D. Ct. Pa. 1951); *Lynne Gregg*, 18 T. C. 291 (1952), *aff'd*, 203 F. 2d 954 (3d Cir. 1953).

The Form as the Receptacle of Tax Rules

It is a mistake to draw the conclusion from these dark comments that draftsmanship is a purposeless skill in the tax law. There is a positive as well as a negative side. In the first place, there are many instances in which the legal document can be the receptacle for tax rules. For example, in a purchase transaction involving deferred payments, the legal document will determine whether any part of the deferred payments is attributable to interest. If the entire amount of each payment represents purchase price, then the purchaser has a capital investment rather than an interest deduction, and the seller receives the payment as selling price rather than as ordinary income. The tax result will be dictated by the legal document.[32] Similarly, where a debtor owes both principal and interest, the parties may agree on whether a particular payment is to be applied against principal or interest, or both. Amounts agreed upon by the parties as repayment of principal may not be taxed as interest.[33] And I have already mentioned the acquisition for a lump sum of a group of miscellaneous assets. If the allocation in the agreement is not purely arbitrary, there is no reason why it should not establish the tax rules as between the parties.[34]

The statute itself frequently permits the legal document to be the receptacle for the tax rule. If an appreciated or depreciated asset is contributed to a partnership, the partnership agreement may dictate the manner in which depreciation or gain or loss is to be shared by the partners.[35] In the same way, the statute permits the draftsman to make an advance determination of the tax consequences of post-death payments for the value of partnership good will.[36] If the agreement specified that such a payment is to be made for good will, the amount so paid is treated as a liquidating distribution. In the absence of such a provision in the agreement, the amount paid is deemed to be an income payment. In the scheme of taxation for trusts and beneficiaries, the statute permits the creator of the trust to allocate specific classes of income to specific beneficiaries.[37]

Thus, there are opportunities in which the skilled draftsman can control tax consequences or contribute to tax certainty by putting his legal document to maximum usefulness. The opportunity may come from the nature of the transaction itself. Or it may be afforded or suggested by the statute. In all of these cases, the tax collector moves in one direction or another, against one taxpayer or another, primarily on the basis of the directional signals in the agreement. The draftsman who neglects to provide these signals, when he has the opportunity to do so, has only himself to blame if the tax collector drives up to his client's front door.

The Value of Factual Background

The second positive factor in the tax effectiveness of legal documents involves the full use of factual background. There is a school of thought which strongly urges that the function of the draftsman is to put down in words the ultimate meaning of the transaction. An agreement, it is said, should contain nothing else. The so-called "whereas" clause is described as a useless frippery characteristic of the old-fashioned practitioner. But even the self-styled modern draftsman must recognize that the factual background can have a significant bearing on the tax meaning of a transaction. In these situations, recitals which express the initial posture of the parties constitute a drafting technique of great value.

On the issue of reasonable compensation, the background factors may be pure surplusage for the employee but may be valuable in sustaining the full deduction for the employer, particularly between related parties. The cost of key-man insurance may be defended as a proper use of corporate earnings if it is incurred to compensate the corporation for the loss of valuable services.[38] A recital of this background factor in the corporate minutes may well be worth the effort it takes to draft it. The gift tax upon a property settlement between a husband and wife which is not followed by a divorce within two years may be avoided by a showing that the settlement was an arm's length bargain with no donative purpose.[39] And the reason for the forgiveness of a debt may have an important impact on whether the debtor realizes debt cancellation income.[40] A draftsman who neglects to record the factual background in these cases is not necessarily foreclosing a favorable tax result, but he is certainly not making it easier for his client. The "whereas" clause cannot therefore be categorically relegated to antiquity.

Timing a Transaction

The third phase of the tax lawyer's skill involves his ability to recast a transaction. Here the element of timing can be significant. This can postpone the date of the tax obligation. In some cases, it can even change the tax result. The simplest illustration of postponement is the contract for the sale of property in which the closing date is advanced to the next taxable year.[41] Some-

32. *Hudson-Duncan & Co.*, 36 B. T. A. 554 (1937); *Oliver W. Bryant*, T. C. Memo., 11 T. C. M. 430, C.C.H. 18,937, P-H ¶52,129 (1952); *cf. Daniel Bros. Co.* v. *Comm.*, 28 F. 2d 761 (5th Cir. 1928); *Henrietta Mills* v. *Comm.*, 52 F. 2d 931 (4th Cir. 1931).

33. *Robert H. Gries*, T. C. Memo., 9 T. C. M. 419, C.C.H. 17,665, P-H ¶50,125 (1950); see *Bair* v. *Comm.*, 199 F. 2d 589 (2d Cir. 1952). In the absence of agreement, partial payment of an obligation is attributable first to the interest due. *Theodore R. Plunkett*, 41 B.T.A. 700 (1940), *aff'd*, 118 F. 2d 644 (1st Cir. 1941).

34. See note 5, *supra*.

35. Int. Rev. Code (1954) §704(c)(2).

36. Int. Rev. Code (1954) §736(b)(2)(B).

37. Int. Rev. Code (1954) §§652(b), 662(b).

38. *Emeloid Co.* v. *Comm.*, 189 F. 2d 230 (3d Cir. 1951).

39. *Rosenthal* v. *Comm.*, 205 F. 2d 505 (2d Cir. 1953); see Int. Rev. Code (1954) §2516.

40. *Boris Corp.* v. *Comm.*, 117 F. 2d 917 (6th Cir. 1941), *cert. denied*, 314 U. S. 638 (1941); *Reynolds* v. *Boos*, 188 F. 2d 322 (8th Cir. 1951).

41. *William U. Watson*, T. C. Memo., C.C.H. 16,928, P-H ¶49,089; *cf. Joseph Frank*, 22 T. C. 945 (1954). A seller may be in constructive receipt of proceeds placed in an escrow fund which places no restrictions upon the purchaser. *Williams* v. *U. S.*, 219 F. 2d 523 (5th Cir. 1955).

times this type of postponement is achieved through an option which cannot be exercised before a specific date.[42] A variation is the installment transaction in which a postponement of some of the purchase price can result in the spread of the period over which the tax obligation is to be paid.[43] The timing factor is always present in the long-term compensation contract where the period of employment and the amount of income required to be realized within one taxable year determines whether relief from the bunching of income is available to the taxpayer.[44] A retiring partner who is offered all cash for his partnership interest can apparently control the year in which his liquidating loss is deductible through the simple expedient of requesting a distribution to himself of a small portion of the partnership property (other than unrealized receivables and inventory).[45]

It is possible also to alter tax consequences simply by a matter of timing. Suppose a farmer is planning to sell his land or to make a gift of land to his son. Shouldn't he be advised that a delay in the transaction until shortly before the harvest of the crop may produce a more advantageous tax result?[46] The postponement of the delivery date of securities may convert a short-term capital asset into a long-term capital asset.[47] Suppose a corporation is planning the liquidation of its subsidiary. The option as to whether the liquidated assets will take the cost basis of the subsidiary's stock to the parent or will be governed by the carryover rule seems to rest with the parent. The result apparently depends on whether the plan of liquidation is adopted within or without the two-year period after the acquisition of control of the subsidiary.[48] Suppose a corporation which is planning to liquidate wants to realize for its own benefit the loss on depreciated "property". If it liquidates within one year after the sale of the property, it might have to forgo the loss on the theory that there was an informal plan of liquidation sufficient to satisfy the statutory provision which does not recognize corporate gain or loss in these planned twelve-month liquidations. It apparently, however, can have the benefit of the loss by formally adopting a plan of liquidation but postponing the liquidating distribution until after the lapse of twelve months.[49]

Recasting a Transaction

Timing a transaction to achieve a desired tax result is only one aspect of the broader skill of recasting a transaction into a more acceptable tax arrangement. The tax law presents many opportunities in which the parties have it within their own control to determine which set of tax consequences will follow. Suppose a corporation plans the distribution of appreciated or depreciated property as a dividend to its stockholders. If the distribution is in satisfaction of a dividend declared in a specific sum of money, the difference between the debt created by the dividend declaration and the basis of the property is taxable gain or loss to the corporation.[50] However, where the dividend resolution requires a distribution of specific property, the corporation has no gain or loss even though the resolution recites that it consists of a dollar amount.[51] In the case of a partnership, no gain or loss is recognized to a partner upon the contribution of property to the partnership.[52] However, if the partner sells property to the partnership instead of contributing it, he has taxable gain or loss. The only limitation is the denial of loss where the selling partner owns more than a 50 per cent interest in the partnership.[53]

The challenge for recasting a transaction is frequently offered by an over-specific statutory provision—one that almost suggests the modifications of a transaction so that it can fall outside the proscribed area. The statute says that no loss is to be allowed upon a sale between members of a family, who include only the taxpayer's brothers and sisters, his spouse, ancestors and lineal descendants.[54] A sale to the taxpayer's son-in-law, or even to his daughter and son-in-law as tenants by the entirety, is apparently outside the statutory disapproval.[55] The statute says that a sale of depreciable property, which is otherwise a capital asset, between a husband and wife or between an individual and a corporation controlled by such individual, his spouse, his minor children or minor grandchildren, will produce ordinary income.[56] A sale of such property to an adult son or to a corporation controlled by the taxpayer's brother would escape the statutory net.

Many of the rules of the tax law are precision made. Results often depend upon exact periods of time, or upon measured family relationships, or upon mathematical percentages of ownership. These rules serve the important function of establishing certainty. The price consciously paid for this certainty is the possibility of avoidance. When the statutory line is meticulously drawn a taxpayer can frequently walk

42. See *Birch Ranch & Oil Co.*, T. C. Memo., 3 T. C. M. 378, C.C.H. 13,881, P-H ¶44,128 (1944), *affirmed on other issue*, 152 F. 2d 874 (9th Cir. 1946), *cert. denied*, 328 U. S. 863 (1946).

43. Int. Rev. Code (1954) §453(b)(2)(A)

44. Int. Rev. Code (1954) §1301.

45. Int. Rev. Code (1954) §731(a)(2); see Rabkin & Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION ¶16.10.

46. Int. Rev. Code (1954) §1231(b); *Elsie SoRelle*, 22 T. C. 459 (1954).

47. See *William U. Watson*, T. C. Memo., 8 T. C. M. 357, C.C.H. 16,928, P-H ¶49,089 (1949). But the extension of a holding period through a loan-option agreement was not recognized, where the transaction was intended as a completed sale. *Deal* v. *Morrow*, 197 F. 2d 821 (5th Cir. 1952).

48. Int. Rev. Code (1954) §§332(b)(1), 334(b)(2).

49. See Int. Rev. Code (1954) §337(a).

50. *Callanan Road Improvement Co.*, 12 B. T. A. 1109 (1928); *Bacon-McMillan Veneer Co.*, 20 B. T. A. 556 (1930).

51. *Natural Gasoline Corp.*, 21 T. C. 439 (1953), *aff'd*, 219 F. 2d 682 (10th Cir. 1955).

52. Int. Rev. Code (1954) §721.

53. Int. Rev. Code (1954) §707(b)(1).

54. Int. Rev. Code (1954) §267.

55. *Stern* v. *Comm.*, 215 F. 2d 701 (3d Cir. 1954); *Walter Simister*, 4 T. C. 470 (1944); see *J. Henry DeBoer*, 16 T. C. 662 (1951), *aff'd*, 194 F. 2d 289 (2d Cir. 1952).

56. Int. Rev. Code (1954) §1239.

across it. Relatively small differences in time, relationship, or percentages can make big differences in tax results. If in practice one of these rules turns out to be a soft spot in the law so that too many taxpayers are able to escape their fair share of the tax burden, Congress will inevitably expand the effective scope of the rule.[57] Until then, the tax draftsman must evaluate his transaction against available alternatives which may produce more favorable tax consequences for his client.

Language in Forms

The final function of the draftsman is to translate the meaning of the transaction into words and to put those words on paper. During the last decade or so legal documents have come under severe criticism. Clients have insisted that the mysteries of draftsmanship must be clarified and that they are entitled to understand their own instruments. A good legal document is one which can be acted upon by a layman without the constant need for professional interpretation. The errors of the past have stemmed, in the main, from the reluctance of draftsmen to surrender traditional forms of expression and traditional forms of structure. Some of our documents read as if they were written by the direct descendants of eighteenth century scriveners.

In the field of language we have been most guilty in the extravagant use of rolling synonyms. We say "bargain, assign, set over, transfer and convey" when the single word "sell" is plainly adequate. Instead of "agree" we say "covenant, stipulate, undertake and agree". We do not simply "execute" a deed, we "execute, sign, seal, acknowledge, authenticate and deliver" a deed. We "make, constitute and appoint", we "give, devise and bequeath", and we "grant, bargain and sell", when a single word in each instance is all that is needed. We seem to forget that the draftsman is no longer paid at a specified rate per word or line.

We are equally guilty of the abundant use of archaic expressions. We say "all and singular my goods, chattels and real property" when we mean "all my property". A one-half interest is described as an "equal undivided half-part or moiety". We say "last will and testament" instead of "will". We use the confusing designation of "party of the first part" and "party of the second part" instead of the real names of the parties, or instead of designating them as buyer and seller or employer and employee. And we are guilty of the tireless repetition of the backward modifiers of "such", "aforesaid", and "hereinbefore".

Phrases Imposed by the Tax Law

There is an old notion that these expressions make legal documents look more professional. The modern draftsman has learned, however, that the simple expression is the mark of his skill, and that there is greater safety and more comprehension in discriminating language than in verbosity. This is particularly true in the tax law where the terms of the statute frequently exercise a tyranny over the draftsman which makes simplicity of expression particularly difficult. For example, the draftsman of a will with a marital deduction clause has the intricate task of describing the composition of the deductible share in both quantitative and qualitative terms. He finds it impossible to escape the use of technical phrases, such as "adjusted gross estate", "property deemed to have passed to my wife", and "terminable interest which cannot qualify for the marital deduction". The draftsman of a clause in a partnership agreement involving the contribution of a group of assets in kind, some of which have depreciated in value and some of which have appreciated in value, is faced with the same frustrating experience.

In cases like these the draftsman must resort to short-cuts of expression—to the use of technical terms which reflect complex statutory concepts accurately. He may even fall back upon the statutory language itself to convey the required tax meaning. Thus, he may describe the share of a marital deduction bequest as one half of the adjusted gross estate as defined for the purposes of the marital deduction under the federal estate tax law (less the value of property which is deemed to have passed from the testator to his spouse for the purpose of the marital deduction).[58] Or in the case of the contribution of assets to a partnership, he may state that depreciation, depletion, gain or loss, for income tax purposes, is to be shared among the partners so as to take account of the variation between the basis of the property and its fair market value at the time of contribution.[59]

In these highly complex areas it is not often possible to achieve the desired simplicity in language. Not to use a technical word in its proper place is as faulty as using too many words. But there is never any requirement that something be said more than once. The draftsman does not add to the clarity of his document by expressing a concept in technical or statutory terms and then paraphrasing the concept in his own words. Conversely, if his own words have been correctly chosen he need not bolster them with a technical repetition. Nor is anything to be gained by adding an explanation of the purposes of the language. I would be extremely skeptical of a provision in a will which wound up with the statement that "it is the testator's intention to secure by this language the maximum marital deduction allowed by law". I would be equally suspicious of a charitable trust which concluded with the provision that "it is the intention of the grantor to create a trust exempt from the federal income tax". These are tell-tale signs of lack of assurance on the part of the draftsman.

Structure of Forms

The broader aspect of the writing

57. See Int. Rev. Code (1954) §707(b)(2) which expanded the rule for the sale of depreciable property between related taxpayers to include sales between a partner and a controlled partnership and sales between two controlled partnerships.

58. See Rabkin & Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Form 7.14.

59. See Rabkin & Johnson, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Form 1.16.

problem is the order and arrangement of the legal document as a whole. Here there are no universal rules. The objective is a sequence of presentation which permits an intelligible consecutive reading of the paragraphs. The veteran draftsman knows that there is no such thing as good writing—there is only good rewriting.

The search for simplicity of structure is particularly important in the tax law. The statute frequently enforces a tyranny over the details of a transaction more exacting than its tyranny over language. A restricted stock option, an employee's profit-sharing plan, a short-term Clifford type trust, a separation agreement, a partnership agreement, and a will are typical instances in which the statute demands from the draftsman an enforced obedience to details. To the extent that the tax law has added its own complications to these and other transactions, it has increased the need for simplicity in the structure of legal documents. If a transaction is in itself complicated, the draftsman, of course, is not to be blamed if its meaning cannot be extracted without careful study. To assist the client it may be advisable to prepare a summary of the basic provisions of the document. This may be all that is ever needed by the client. The preparation of such a summary may even be helpful in formulating a logical pattern for the agreement. The ultimate objective, however, is clarity in the agreement itself—clarity not only for the technician, but for the layman as well. The draftsman is more likely to attain this objective if he develops his document as a logical succession of short paragraphs and if he expresses his thoughts in easily intelligible language.

The "Model" Form

Where does the model legal form fit into all this? It is rare, at least in our complex economy, that any form can be adapted simply by changing the names of the parties. At most, the model form illustrates the langauge and structure given by someone else to what appears to be a comparable situation. But the model form is a product of the legal hot house. It is developed under ideal, but artificial, conditions. It can never be carelessly transplanted to the open field of legal practice. The job of the draftsman is to make his own integration and interpretation of his facts, and to test them against the local law and the tax law. No good lawyer will blindly follow a form. He may use it as a check list of the items requiring his consideration. He may borrow from it a well-turned clause or even some of the boiler plate occasionally demanded by the tax law. But he will never accept it as a convenient or time-saving alternative for his own draftsmanship.

This article is intended to be a lesson on how to construct good legal documents. I have tried to supply some general observations. If the lesson is complete, it will teach us well how to recognize a good legal form, and when and to what extent it can be copied with assurance. But this will come only as an incidental by-product of the basic lesson in draftsmanship. A good legal form is never a substitute for a good lawyer. But it can be a valuable tool in the hands of the draftsman who can add to it his own informed judgment and his own mellow wisdom.

The above article is a condensation of a paper on Major Tax Planning of 1956 (1956 Southern California Tax Institute) published by Matthew Bender & Company, Albany 1, New York, as part of the University of Southern California Tax Institute Proceedings, copyrighted by the University of Southern California School of Law.

Capital Punishment

(Continued from page 116)

in itself is a complete admission that life imprisonment does not produce sufficient horror in the mind of the killer to deter him. The importance of the death penalty for murder lies in the fact that it has proved to be a deterrent. The abolition of the death penalty in this country usually has been for short periods, followed by its restoration when the murder rate rose. Specific cases can be cited to prove that in particular instances an individual planning murder would commit his crime in a jurisdiction that did not apply the death penalty, thereby proving that the greater penalty would deter him, whereas the lesser would not.

There is still one more reason for retaining capital punishment: The people—those whom we seek to protect—want it. In 1948, in England, capital punishment proposals in connection with the Criminal Justice Bill before Parliament for consideration were the subject of wide discussion. Most of the people were against abolition. A Gallup Poll, conducted for the *Daily Telegraph*, showed 69 per cent for retention and 13 per cent for repeal.[20] Abolitionists say the public is not enlightened. That argument is always used to rationalize a minority point of view; but it is no more valid in this case than in any other case where two points of view exist and the question is resolved in accordance with the democratic process.

Another Biblical Quotation . . . *The Abolitionists' Argument*

The abolitionists are equally persuasive. They, too, open their argument by quoting Scripture: "Vengeance is mine; I will repay, saith the Lord."[21] He says further, "Judge not that ye be not judged."[22] No human instrumentality is fit to pronounce and execute an irrevocable judgment. Only God with His infinite wisdom and charity should wield that awful power. It is part and parcel of Christian belief that any idea of vengeance for the commission of criminal or sinful acts is the privilege of God Himself. Christ repudiated the old principle of *lex talionis* in the well-known passage: "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: but I say unto you, That ye resist not evil: but whosoever shall smite

---

20. George Ryley Scott, THE HISTORY OF CAPITAL PUNISHMENT (1950) page 233.
21. Romans XII:19.
22. St. Matthew VII:1.

thee on thy right cheek, turn to him the other also."[23] That no human being is beyond all hope of reformation is implicit in Christianity.

The punishment of criminals is based on one or more of the following theories: retribution; deterrence; reformation; and, in the case of capital punishment, the need of eliminating those who menace the life and security of society. The idea of punishment solely as retribution, which is merely a polite word for revenge, is gradually disappearing. This idea is yielding to the more modern, progressive and scientific attitude that retribution is not justification for any system of punishment, nor are its results beneficial.

Historically, capital punishment has failed as a deterrent. According to Hume, the historian, 72,000 thieves were executed in the reign of Henry VIII; and 19,000 criminals of one sort or another perished at the end of a rope during the reign of Queen Elizabeth. These are truly appalling figures, and yet we can find no evidence that these extreme measures caused crime to diminish.

From all available statistics we must conclude that capital punishment, as applied today, still fails as a deterrent. Warden Lawes[24] concluded, after extensive research, that the death penalty has no apparent effect as a deterrent. Karl F. Schuessler,[25] basing his conclusion on appropriate statistics covering the period 1931-1946, and comparing states that have retained the death penalty with abolition states in the same section of the country having similar social and economic characteristics, states that his "studies . . . disprove the claim that the death penalty has any special deterrent value". The Royal Commission on Capital Punishment, studying the problem in Great Britain during the period 1949-1953,[26] observed that "there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall". Barnes and Teeters[27] state, after considering available statistics, that "the rate of homicide is approximately the same in each of the States within a given area. . . . The presence of the death penalty appears to have nothing to do with the amount of homicide."

Those who favor the retention of the death penalty make much of the fact that some states abolished and later restored the death penalty. The conclusions to be drawn from these experiments are, however, by no means so decisive as would at first sight appear. In each case the cause of the restoration was the occurrence of some sensational or particularly brutal crime, and there is no evidence that the particular crime would not have occurred had the death penalty been part of the penal code. Missouri, Oregon, Arizona and Washington deserted the abolition column shortly after World War I. The rise in the number of murders was mistakenly attributed to the absence of capital punishment, though there was a general increase in crime throughout the United States at that time and other states were going through the same experience.[28]

Justification for abolishing the death penalty does not rest alone on statistics. Other compelling factors should be considered. Those who favor the retention of the death penalty can point to isolated and very rare instances where a paroled murderer repeated his crime, or where an individual contemplating murder sought to accomplish his crime in a state where the death penalty did not exist; but there is neither reason nor justice in the policy of hanging or electrocuting a hundred men for the sake of deterring one monster. Furthermore, for every one of these cases, abolitionists can cite a case where orgies of homicide have followed a single execution. Actually a killing—legal or otherwise—encourages more killings.

If the death penalty is a deterrent, we should logically let the public witness an execution so that the spectacle might save someone from a crime he might otherwise commit. Felony prisoners should have reserved seats. We shouldn't put a prisoner to death as painlessly as possible. If the efficacy of punishment be found in its severity, such severity should be increased until it results in minimizing crime. By making our executions as private and as humane as possible, we admit that if any influence at all is exerted, it

23. St. Matthew V:38-39.
24. Man's Judgment of Death, 1924, page 21.
25. *Deterrent Influence of the Death Penalty*, the Annals of the American Academy of Political and Social Science (November, 1952).
26. Commission Report, paragraph 65.
27. New Horizons in Criminology (1943) page 432.
28. Lewis E. Lawes, Man's Judgment of Death (1924) page 23, Table XIII and Chart III.

must be debasing or positively harmful.[29]

When cornered, a proponent of capital punishment will admit that the death penalty may not presently be an effective deterrent because it is so seldom imposed; but he hastens to assert that it could be a deterrent if used more often. Well, it will not be used more often! Human nature being what it is, the situation will not change. The trend is in the opposite direction. If it is to prove a deterrent, it must be carried out so rigorously that it inevitably involves a grave risk of the innocent being executed; and if it is to be surrounded by sufficient effective safeguards as to avoid this risk, then it has to be carried into effect so seldom that it loses practically all its reputed deterrent effect.

Retentionists base their argument on the supposition that life is man's most valuable possession, and that the death penalty is the only effective deterrent of capital crime. How then do they explain the fact that we must guard a condemned prisoner night and day to prevent suicide. The argument is seriously weakened, also, by the undeniable fact that many are perfectly willing to risk death in order to retain, or obtain, their liberty. And if we want him dead, why must we work so hard to keep the condemned healthy till his execution? One night, at Sing Sing, three eminent surgeons fought around the clock to save Frank Plaia from dying of appendicitis so he could be electrocuted.[30]

Murder, of all crimes, is the one where fear of the penalty, under any circumstances, is least likely to be present. No person who kills another in a fit of overmastering passion, anger, or hatred can be influenced in any way by the fear of execution. The act is over and done with before reason returns. The insane murderer, whether the insanity is permanent or temporary, is in a similar position. As regards the premeditated and carefully planned crime, here again there is no thought of consequences, for the murderer is convinced that having planned the perfect crime, discovery and punishment are impossible. This latter type of murderer is impossible to deter. The more brutal the man, the more appropriate the subject for a death penalty, the less likely the subject is to be deterred. The odds in his favor—fifty to one—satisfy him. Fortitude is not a trait possessed only by good people. True, this type of murderer is apt to repeat the crime; but if we execute him for *that* reason, why not execute the homicidal maniac, or the person who has attempted murder and failed, or the 17-year-old murderer.

Most murderers are not likely to repeat the crime. In the great majority of cases the murderer is not a criminal by nature, as we understand the term. Most wardens agree that, as a group, these individuals are the most reliable and dependable in the institution.[31] Most convicted murderers have never before been convicted of a serious crime. Information available from those states that have substituted "life imprisonment" for the death penalty does not suggest that the prisoner serving a life sentence for unlawful homicide is more likely to commit murder than the prisoner serving a similar sentence for any other crime.[32] The reformation of the individual offender is usually regarded as an important function of punishment. But it can have no application where the death penalty is exacted, if "reformation" is taken to mean not merely repentance, but re-establishment in normal life as a good citizen. Experience indicates that the prospects of reformation are at least as favorable with murderers as with those who have committed other kinds of serious crimes.

There is another compelling reason which cries out for the abolition of the death penalty. Many of those persons executed in the past have been mentally ill, though legally "sane". For over a century, our criminal law has clung to the so-called "right and wrong" test of sanity laid down in *McNaghten's* case of 1843. Psychiatry has long since discarded such concepts of responsibility. Mental disturbance has little or no connection with ability to distinguish right from wrong. Recognition that there is a type of person who, despite being entirely cognizant of the fact that an act is homicidal and punishable, cannot refrain from its commission, is essential to a proper understanding of the problem of murder. The Royal Commission on Capital Punishment, 1949-1953, concluded that, "The test of responsibility laid down by the *McNaghten* Rules is so defective that the law on the subject ought to be changed."[33] A recent remarkable decision of the U.S. Court of Appeals for the District of Columbia Circuit, in the *Durham* case criticizes our present concept of criminal responsibility and presents a more enlightened formula.[34] In my opinion, the fact that in some states,

29. A century ago in England, in order to produce the maximum deterrent effect, the execution of a criminal was made a public spectacle, attended by curious or morbid crowds, in which thieves and robbers plied their trade. Pickpockets had a field day, for example, whenever one of their associates was publicly hanged. As death penalties mutiplied, capital offenses multiplied, until the whole abominable system collapsed. In 1868 public executions were abolished in England. New York State discontinued public hangings in 1835; and one by one most of the other states followed this example.

30. SPRINGFIELD [MASS.] REPUBLICAN, September 16, 1929.

31. Lewis E. Lawes, MAN'S JUDGMENT OF DEATH (1924) page 49.

32. George Ryley Scott, THE HISTORY OF CAPITAL PUNISHMENT (1950) page 275.

33. Report, paragraph 333; See also paragraph 317 suggesting new test: "The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it."

34. *Durham* v. *United States*, 214 F. 2d 862, at page 875: "Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity."

including California, the "irresistible impulse" is not legally recognized, is further evidence that our legal definition of insanity is inadequate and not in accord with medical knowledge and experience.[35] No doubt about it, the "right and wrong" test must go, and it will. Meantime, however, it's the law and the hangman is skulking in the background whenever a mentally ill person is tried for murder.

As we seek a better solution to this problem, the theory of "diminished responsibility" should receive consideration. This doctrine is of fairly recent birth, and it recognizes the existence of a type of criminal who, while being neither entirely responsible for his actions, as in the case of the normal individual, nor altogether irresponsible, as in the case of the insane person, is of a state of mind which signifies the existence of such a degree of weakness of intellect as to justify a reduction of the crime with which the culprit is charged, from that of murder to culpable homicide. The death penalty prevents any concept of diminished responsibility, short of full responsibility or exculpation, being acceptable.

Along this same line, the "old" law with respect to provocation required in order to reduce a killing from murder to manslaughter[36] should be changed to permit a jury to return a verdict of manslaughter when they are satisfied that the accused was deprived of his self-control by provocation, and that a reasonable man might have been so deprived, notwithstanding that the provocation was by words alone.[37] Granted, words alone will seldom constitute adequate provocation to a reasonable man; but the question should be left to the jury.

Occasionally, those who advocate retention of capital punishment argue that taxpayers should not be required to support a murderer for life, when execution is so much cheaper. This argument has frightening implications and, I trust, appeals to very few people. In any event, we execute, on an average, seven persons a year in California. This doesn't even put a dent in our felony prisoner population of approximately 16,000.

When we speak of the sacredness of human life, we think rather of the innocent victim and of those bereaved by his slaughter than of the fate which society pronounces on the slayer. But no pity for the victim, no sentiment or horror which the crime arouses, can absolve us from the obligation to deal with the offense and the offender in the interests of humanity and of the welfare of the community.

Finally, in defense of abolition, we must realize that innocent persons *have* been executed. We don't know how many. We only know of a relatively few cases where by some stroke of fate, the innocence of a wrongly convicted and executed person has been established. Perjury is not unknown. Juries *do* make mistakes. An appeal does not ordinarily mean a retrial. Appellate courts —for good reason—cannot second-guess the trier of fact. The question is not, Is he guilty? but rather, Was he lawfully convicted? Admittedly any case of wrongful conviction is monumentally rare. But such cases have occurred. And they almost certainly will occur again.

Most of our states allow the court or jury to impose life imprisonment or the death sentence. This is proof that most people recognize the existence of a distinction in degree, even in premeditated murder; and that there are murderers (the majority if judged by the percentage who receive life sentences as compared with those condemned to death) who, even in the opinion of its advocates, do not deserve the death penalty. But what man, or group of men, is qualified to determine the precise point at which this fine line should be drawn?

We have briefly considered both sides of the argument, and can safely draw certain conclusions: Although it may appear that the death penalty *should* be the most effective deterrent, there is no proof that it is. On the other hand, there is no proof that it is *not*. Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures, but not its successes. We do not know how many people have refrained from murder because of the fear of execution. The death penalty can be justified only if it is proved to be necessary and effective as a deterrent. If two alternative measures will serve equally to protect from or suppress crime, the adoption of the lesser of the punitive measures is indicated. Apart from the questions of humanitarianism, justice and ethics, the risks inherent in the adoption of any stronger measure to the freedom of the individual are ever present. Here then is the $64 question: Is the death penalty the most effective deterrent? We can't answer that question definitely one way or the other on the basis of available statistics.[38] I neither propose nor predict the early abolition of the death penalty. On the contrary, human nature being as it is, the burden of proof seems to be on the abolitionists; and it is likely that capital punishment will be retained (possibly in a more limited form) unless and until it is proved *not* to be the most effective deterrent.

35. *People* v. *Morisawa*, 180 Cal. 148; *People* v. *Spraic*, 87 Cal. App. 724.

36. The rule in many states, and in California until 1946: neither words nor insulting actions nor gestures, alone are sufficient—*People* v. *Bruggy*, 93 Cal. 476; *People* v. *Turley*, 50 Cal. 469; *People* v. *Jackson*, 78 Cal. App. 442.

37. See *People* v. *Valentine*, 28 Cal. 2d 121, 137-144 (1946).

38. A recommendation has been made to the American Bar Association's Committee on the Administration of Criminal Justice that this matter be given further study.

Classified

RATES *20 cents per word for each insertion: minimum charge of $2.00* **payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East Sixtieth Street, Chicago 37, Illinois.*

BOOKS

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 306 West 1st Street, Los Angeles 12, California.

WRITE US FOR YOUR TEXT BOOK needs. Good used law books bought, sold and exchanged. (In business 47 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS—complete stocks on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 538 South Dearborn St., Chicago 5, Illinois.

THOMAS LAW BOOK COMPANY PUBLISHers. We Sell, Buy and Exchange. Incorporated 1885. St. Louis 2, Mo.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 64-page printed catalog free on request lists some used law books we have for sale, also indicates the type of materials we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 2, Louisiana.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: U. S. Attorney General opinions, complete sets and odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes, U. S. Supreme Court Reports complete, Law Edition.—U. S. Supreme Court Reports, Official Single Volume edition complete. —Supreme Court Reporter, complete. ALSO, the following complete Law Reviews: Notre Dame Lawyer, Marquette Law Review, Yale Law Journal, Harvard Law Review. Write us for your every law book need—DENNIS & Co., INC., 251 Main St., Buffalo 3, New York.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY 1110—13th St., N. W. Washington, D. C.

EVERYTHING IN LAW BOOKS, GEORGE T. BISEL CO., Philadelphia 6, Pa.

LAW BOOKS USED AND NEW—BOUGHT, sold, traded. Reporter System Units, American Law Reports, American Jurisprudence, Corpus Juris Secundum. U. S. C. A., Digests, all text books, etc. Appraisals free. R. V. BOYLE, Law Books, Leonhardt Building, Oklahoma City 2, Oklahoma.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN Co., Ltd., 11 Park Place, New York City.

"THE HAND OF HAUPTMANN," STORY of Lindbergh Case by Document Expert Cited by John Henry Wigmore, 368 Pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N. Y.

"THE DIRECTORY OF AMERICAN JUDGes". Over 6000 biographical sketches of sitting judges. Complete table of American State and Federal Courts and judges. Introductory price $15.00. Offered on 10-day approval. American Directories, 1005 Belmont, Chicago 13, Ill.

LAW BOOKS BOUGHT, SOLD, EXchanged. Free Catalogue, IRVING KOTHS, 516½ Main St., Vancouver, Washington.

HAS YOUR WIGMORE SUBSCRIPTION lapsed? Bring your "Wigmore on Evidence" completely up to date with the new 1955 Supplement (containing 9000 additional statutes and 11,000 cases). Only $20.00. Complete 10 volumes with supplement, $175.00 Little, Brown & Co., 34 Beacon St., Boston, Mass.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Document, Second Edition," 736 Pages, 340 illustrations, $12.50 delivered. Also "Questioned Document Problems, Second Edition," 546 Pages, $8.50 delivered. ALBERT OSBORN, 233 Broadway, New York 7, New York.

LAW BOOKS BOUGHT, SOLD, REBOUND. MITCHELL 5738 THOMAS PHILA., Pa.

HANDWRITING EXPERTS

KARL SCHOTTLER, 915 CHESTNUT Street, St. Louis 1, Mo., Telephone GArfield 1-3399, Document Examiner and Handwriting Expert; Modern Laboratory; Scientific Technique in Document Examinations.

GEORGE G. SWETT, ST. LOUIS, MISsouri, 14 South Central (5) Telephone: PArkview 5-9394. Handwriting, typewriting and document expert U. S. Post Office Department 12 years. All types of document problems considered. Photographic laboratory maintained. Centrally located on major air and rail lines. Member American Society of Questioned Document Examiners.

HARRY M. ASHTON, 3601 EDWARDS Road, Cincinnati 8, Ohio. Telephone East 1-6704 Over 30 years with Post Office Department Qualified in all courts. Completely equipped laboratory for handling all types of document problems. Member American Academy of Forensic Sciences and International, Association for Identification.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518; and 690 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 1728 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

CHARLES SCOTT, DOCUMENT EXAMINer. Author; "Photographic Evidence". Written opinions all handwriting and typewriting questions. Fully equipped laboratory. Qualified witness. Nationwide experience. Commerce Trust Building, Kansas City, Missouri. Telephones: Office—VIctor 2-8540, Residence—NIagara 2-3246.

LUKE S. MAY, CONSULTING EXPERT & examiner of "Questioned Documents." Qualified all courts United States and Canada. Advanced Scientific Evidence Laboratories for proof of facts all types disputed papers. Phone Elliott 2445. 843 White-Henry-Stuart Building, Seattle 1, Washington.

BEN GARCIA, EXAMINER OF QUESTioned handwriting, typewriting and inks. Qualified witness. Years of experience. 805 E. & C. Building, Denver, Colorado. Phone: AComa 2-1729.

LINTON GODOWN, MEMPHIS. EXAMINER handwriting, typewriting, inks, alterations, etc. experienced qualified witness. Member ASQDE. Manhattan Bank Bldg., JAckson 6-4321.

DR. WILMER SOUDER, CONSULTANT. REPORTS, EXHIBITS, TESTIMONY. 30 years' experience in State and Federal Courts. 3503 Morrison St., N. W., Washington 15, D. C. Phone: WOodley 6-3050.

MISCELLANEOUS

LOOKING FOR A PUBLISHER OF YOUR novel, biography., legal manuscript, poetry, etc? All subjects considered. New authors welcomed. Write for Free Booklet LX, VANTAGE PRESS, 120 West 31st Street, New York.

EXPLOSION AND VIBRATION CLAIMS—scientific measurement and evaluation of explosion, blasting and vibration effects—and their capacity to cause structural damage. Consultations, investigations, expert testimony, nationwide service. Write for brochure descriptive of our services. L. Don Leet, Ph.D., President THE VIBRATION ENGINEERING COMPANY, 301 Hazleton National Bank Building, Hazleton, Pennsylvania. Phone GL 5-1961.

VALUATION OF CLOSE CORPORATION stock. Thoroughly documented appraisals prepared for gift and estate tax purposes, sales mergers, recapitalization, etc. A background of effective cooperation with attorneys, accountants, executors, and financial institutions. Write for free brochure. MANAGEMENT PLANNING, INC., 192 Nassau Street, Princeton, New Jersey.

POSITIONS WANTED

HEAVY EXPERIENCED CORPORATION counsel, general practice, administrative executive, trade regulations, FTC, Fed Food, Drug & Cosmetics, Anti-trust, ALL HOUSE COUNSEL PROBLEMS, all courts, Illinois and Florida bars. Married, 39. Presently employed large corp., desires change to large corp. or law office, will re-locate. Box 5N-7.

LABOR LAWYER, 31, ILLINOIS, FEDERAL Bars. Heavy experience negotiations, arbitrations, litigation: LMRA, Railway Labor Act, F.E.L.A.; desires labor relations/law firm position. Re-locate. Box 6F-1.

TECHNICAL SERVICES AVAILABLE

ATTORNEYS, ATTENTION! LORNE D. Beggs, Elevator Consultant. My more-than-30 years' experience to serve you. Box 3363, Merchandise Mart Station, Chicago 54, Illinois.

ROBES

JUDICIAL ROBES CUSTOM TAILORED—The best of their kind—satisfaction guaranteed —Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.

SHORTHAND AND STENOTYPE REPORTING

WHEN IN NEW YORK CITY, COME AND get it! Sensational new five-year wall calendar . . . a year at a glance . . . 1956 - 1957 - 1958 - 1959 - and - 1960. Size 17 x 34". It solves your problems for a beautiful wall calendar until 1961. SANSOM COURT STENOS., 154 Nassau Street. Phone: BEekman 3-3381. ALSO REMEMBER. . . One lawyer had an out-of-town stockholders' meeting. . .not reported by us. . .we could have saved $850 for him. Another lawyer had a 25-copy case in Philadelphia . . . not reported by us . . . we could have saved $738 for him. Why not save money by consulting with us on court reporting problems?

SAN FRANCISCO: HART & HART(SINCE 1927), official reporters (shorthand and machines); notaries; private deposition suite; Chancery Building, 564 Market Street. References local bench and bar.